Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

MICHAEL DAVID LAMONT, JR.,

Petitioner,

v.

CHRISTINE AND PATRICK O'DONNELL,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Oregon

PETITION FOR WRIT OF CERTIORARI

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September 30, 2004

QUESTIONS PRESENTED

1. To what extent can a State, consistent with the federal Due Process Clause, inject itself and third parties into the nuclear family by applying a private, third-party "psychological parent" statute to deprive an otherwise fit custodial parent of custody of his or her children?

2. In "psychological parent" custody adjudications, what weight must trial courts accord the child-rearing decisions of a fit custodial parent which are consistent with the best interests of the children ?

3. Does the application of a state statute, which allows a private third party to deprive a fit custodial parent of custody, absent a heightened showing of extraordinary or exceptional circumstances, violate that fit parent's guarantee to Due Process under the Fourteenth Amendment to the US Constitution?

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The respondent in the circuit court case was the appellant in the Court of Appeals of the State of Oregon and the respondent on review in the Supreme Court of the State of Oregon. The named respondent in the original court case was Michael David Lamont, Jr.

The intervenors in the circuit court case were the respondents in the Court of Appeals of the State of Oregon and the petitioners on review to the Supreme Court of the State of Oregon. The named intervenors in the circuit court case were Christine and Patrick O' Donnell.

The petitioner in the circuit court case, the Court of Appeals cases and the Supreme Court case was Rayne Elizabeth O'Donnell-Lamont (deceased).

The intervenor in the circuit court case was an intervenor-respondent in the Court of Appeals of the State of Oregon and an intervenor-respondent in the Supreme Court of the State of Oregon, but did not cross-appeal from the circuit court decision denying him visitation rights.

Darcia Krause, attorney, and Basic Rights of Oregon, Inc. appeared *amicus curiae* before the Supreme Court of the State of Oregon on intervenor's petition for review.

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Petitioner, Michael David Lamont, Jr., respectfully requests that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of Oregon and that court's Order Denying Petition for Reconsideration entered on July 27, 2004.

OPINIONS BELOW

The order of the Supreme Court of the State of Oregon denying Petition for Reconsideration is reported at 2004 Or LEXIS 519 (2004) and is reprinted in Appendix F hereto. The opinion of the Oregon Supreme Court is reported at 337 Or 86, 91 P 3rd 721 (2004), and is reprinted in Appendix A hereto.

The opinion of the Oregon Court of Appeals on Reconsideration is reported at 187 Or App 14, 67 P 3rd 939 (2003), and is reprinted in Appendix E hereto. The first opinion of the Oregon Court of Appeals is reported at 184 Or App 249, 56 P 3rd 929 (2002), and is reprinted in Appendix D hereto.

The Judgment Re Custody, Parenting Time and Third-Party Visitation, as well as the Supplemental Judgment: Money Judgment, entered in the Circuit Court of the State of Oregon for the County of Washington (Steven L. Price, Judge), have not been reported. They are reprinted in Exhibits B and C, respectively, hereto.

JURISDICTION

The Supreme Court of the State of Oregon filed its opinion on June 10, 2004, and entered an order denying petitioner's petition for reconsideration on July 27, 2004. This Court has jurisdiction under 28 USC § 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Fourteenth Amendment to the United States Constitution, and the "psychological parent" statute of the state of Oregon, former ORS 109.119 (1997 Edition), now current ORS 109.119 (2001 Edition), are set forth in Appendix G, hereto.

STATEMENT OF THE CASE

Petitioner (hereinafter "father") and petitioner below (hereinafter, "mother") were married in December 1991 and had two children, Taryn, born in September 1992 and Seaira, born in January 1996. Father and mother were divorced effective September 1998 and mother was awarded custody of the two children. App D-2,3

In March 1999, mother died from a preexisting heart condition after which father agreed to allow his two children to stay with respondents, the maternal grandparents (hereinafter "grandparents"). App D-3. Unable to agree on permanent arrangements for the children, father reasserted his right to custody of the children.

In July, 1999, grandparents sought and were later granted intervenor status in the dissolution proceeding as parties who had established a statutory child-parent relationship with the two minor children. App D-3,4. Grandparents initially obtained an *ex parte* order awarding them custody. The court ordered the children returned to father, who agreed that he would keep them in the Salem, Oregon area. App D-3,4. Father moved with the children to Montana for a brief six week period (Findings 31 and 32; App B-7,8), but returned the children to Oregon when ordered by the trial court to do so. App D-4. Upon returning to Oregon, father, his domestic associate and the children lived first on the paternal

grandfather's property in Mill City, then moved to a house in Lyons, Oregon. App A-5; App D-4. They lived there with the children through the trial court hearing in May, 2000 (App B-1), and on through the trial court's letter of opinion issued in July, 2000 (App D-4).

Father had physical custody of his children from July 1999 until custody was transferred to grandparents at the beginning of the school year in September, 2000, prior to the entry of the trial court order in December, 2000. App B-6,15,23.

Following the trial court ruling awarding custody to grandparents, the trial court awarded grandparents a judgment for attorney fees and costs in the sum of $8,875, due and payable on March 29, 2001, plus interest accruing at the rate of 9% per annum on any unpaid balance. App C-4.

During the trial court case, father did not challenge the facial constitutionality of the custodial standard of former ORS 109.119 (1997 Edition). App G-5-8. Rather, father raised an "as applied" constitutional challenge, arguing that as the "natural parent" he had "supervening rights which include the right to uninterrupted custody absent a showing that he is unfit, abusive, neglectful, or has abandoned his children." App I -1. During closing argument, father's counsel asserted that until father was found to be unfit, "it's our contention that we don't even get to the best interest threshold.... My client is the dad.... He...has the right to say where the kids go absent a revocation of those rights." App I-1,2. Father urged the trial court to apply father's "supervening right", following the Oregon Supreme Court's decision in *Sleeper and Sleeper*, 328 Or 504,511, 982 P 2nd 1126 (1999); App I-2.

The trial court addressed the impact of this Court's decision in *Troxel v. Granville,* 530 US 57 (2000), which was decided after the trial court hearing but before the trial court opinion. App A-9.

The trial court found, *inter alia,* that "[a]ll of the

dangers that father presented at Mother's death are still there. These circumstances present sufficient threat of harm to the children to defeat whatever supervening right Father may have as a biological parent." (Finding 42) App B-10

The trial court, in awarding custody of father's two children to grandparents, concluded that it had properly applied the presumption to which father was entitled, but nevertheless determined that it would be in the best interest of the children to award custody to grandparents under former ORS 109.119 (1997 Edition). App A-9,10; App D-4 (note 3).

Father filed a timely appeal. A three judge panel of the Oregon Court of Appeals reversed the trial court's decision, taking guidance from this Court's decision in *Troxel* that "the Due Process Clause of the Fourteenth Amendment protects the fundamental rights of parents to make decisions concerning the care, custody and control of their children.' 530 US at 66." (App D-6). The appellate court noted that this fundamental right "requires an even stronger showing than ordering visitation over the parent's objection." App D-7 (note 7).

The test fashioned by the Court of Appeals under former ORS 109.119 (1997 Edition), was that grandparents must establish "that the evidence as a whole preponderates in their favor...that father cannot or will not provide adequate love and care for the children or that placement of the children in father's custody will cause them undue physical or psychological harm." App D-9. The appellate court held that grandparents had failed to meet this test. App D-13.

In awarding father custody under this custodial standard, the Court of Appeals gave little weight to the report and testimony of the custody evaluator who "focused exclusively on the best interest of the children without regard to father's fundamental right to their care, custody and control...." The Court of Appeals concluded that "the trial court did not evaluate the effect of father's parenting on the children by itself...." App D-10 (note 9).

The Court of Appeals focused on father's decisions impacting the care, custody and control of his two children primarily when he had physical custody of his children from July 1999 through July 2000. The appellate court, on *de novo* review, made the following findings of fact:

(1) Father was actively involved with the children's care and upbringing before mother's death both before and after the divorce. App D-11;

(2) Although his employment often kept him away from home, father's involvement with his children increased after their mother's death. App D-11;

(3) During the time father had custody, he was employed with well-paying jobs; father's employer testified that father was a good worker and that he allowed time off from work to attend to his children's needs. App D-11;

(4) During the time father had custody, he enrolled the older child in school. The child's first grade teacher testified that the child was doing well in school and had no emotional or behavioral problems. App D-11;

(5) During the time father had custody, father enrolled the younger child in an appropriate day-care program and both children did well while in father's custody. App D-11;

(6) While father had custody, he arranged for appropriate counseling to help the children resolve the grief issues arising from their mother's death. App D-12-13;

(7) Independent witnesses, including two police officers, testified that while father had custody of his children, neither his family nor his girlfriend exhibited any anger or drug use problems nor any problems with abnormal or inappropriate actions with the children; father did not pose any danger to his children. App D-12;

(8) The expert psychological testing did not suggest that

father is violent or abusive, despite more remote incidences of conflict with mother. App D-12.

While father's lack of candor with the court was of concern, neither that nor his move to Montana were decisive factors in the Court of Appeal's decision to reverse the trial court. App D-2 (note 2), 11.

Grandparents filed a timely petition for reconsideration. On reconsideration, the Court of Appeals, in a deeply divided opinion, held that the 2001 amendments to ORS 109.119 were fully retroactive and applied to the facts of this case. App E-2 The prior opinion was modified accordingly and adhered to as modified by an equally divided court. Grandparents' request for remand was denied by an equally divided court. App E-2.

Grandparents then filed a timely petition for review to the Oregon Supreme Court which was granted. In his Brief on the Merits before the Oregon Supreme Court, father argued that federal Due Process requires a rebuttal standard as well as a "high threshold showing of either unfitness or extraordinary circumstances...." (App H-2). Father argued for a showing that the parent "will harm the child" (App A-22), and for a showing of a relevant *nexus* between any of the remaining non-exclusive rebuttal factors and either unfitness or harm to the child. App I-2,3.

On *de novo* review of the record, the Oregon Supreme Court reversed the two decisions of the Court of Appeals and affirmed the judgment of the trial court, pursuant to current ORS 109.119 (2001 Edition), awarding custody of the children to grandparents. App A-2,3.

The Oregon Supreme Court rejected father's constitutional arguments (App A-40,41), as well as the contention that because father's liberty interest is fundamental, courts must apply heightened scrutiny in third-party custody

cases. App A-17. The Oregon court noted that this Court's *Troxel* decision made it "difficult to identify the scope of the parental rights protected by the Due Process Clause or the showing that the state or a nonparent must make before a court may interfere with a parent's custody or control of a child." App A-16.

The Oregon Supreme Court concluded that this Court's *Troxel* decision "declined to address the so called 'harm' standard, and that it also failed to articulate an 'inadequate care' requirement". App A-41. The Oregon court characterized father's fundamental Due Process right as "important, but limited." App A-41. The Oregon Supreme Court concluded that its decision and the Oregon legislature's statutory "*Troxel* fix" (current ORS 109.119) sufficiently adhered to *Troxel*'s mandate to require a "state to give 'some special weight' to the interest of a parent in decisions regarding a child." App A -41.

Notwithstanding this decision, the Oregon Supreme Court (App A-29-30), as did the Court of Appeals (App D-10) and the trial court (Finding 40; App B-9), all found that father was a "fit" parent — "that grandparents have not shown father is 'unwilling or unable to care adequately' for the children." App A-30. See, statutory rebuttal factor at current ORS 109.119 (4) (b) (A). App A-29. The Oregon Supreme Court also found that father had encouraged a close relationship with his children and their grandparents, pursuant to current ORS 109.119 (4) (b) (D). App A-35,36.

Because grandparents cared for the children during March of 1999 — more than a year prior to the trial court hearing — the Oregon Supreme Court found that grandparents "recently had been the children's caretakers," pursuant to the rebuttal factor at current ORS 109.119 (4) (b) (B). App A-30-31.

Next, because of father's move to Montana, the Oregon

court found that father had unreasonably denied or limited contact with grandparents, under the rebuttal factor at current ORS 109.119 (4) (b) (E). App A-36, 37.

Most importantly, because of father's alleged "lack of understanding of the children's emotional and developmental needs, his difficulty in controlling his own anger, his lack of insight"...[his failure] "to recognize the emotional attachment that his children have to grandparents... or the impact on the children of the family's changes of residence," together with his girlfriend's alleged "deficiencies as a caregiver, and father's complete failure to acknowledge any of them", the Oregon Supreme Court found that father posed a "serious risk" of psychological or emotional harm to his children. App A-33 Prior to making this finding of harm, the court applied the rebuttal factor at current ORS 109.119 (4) (b) (C) (10) (b), but fashioned a new, heightened "serious present risk of harm" standard. App A-32,33 (emphasis added).

The Oregon Supreme Court agreed with the trial court's finding that "'[f]ather's conduct convinces me that he will remove his children from this area if possible and do all he can to eliminate contact between the children and the Grandparents'". App A-36.

Lastly, the Oregon Supreme Court developed a simple "consider[ation of] all the evidence" test — "whether the evidence as a whole is sufficient to overcome the presumption that the parent acts in the best interest of the child." App A-28,38. Under this test — and notwithstanding father was found to be a fit parent — the Oregon Supreme Court found that the evidence "as a whole" overcame the *Troxel* presumption. The Oregon Supreme Court then summarily agreed with the trial court that the children's best interest would be best served by awarding custody to grandparents. App A-38-39.

Father filed a timely petition for reconsideration of the Oregon Supreme Court's decision. The petition for

reconsideration raised three substantial federal questions.

First, father asserted that the Oregon Supreme Court's decision, contrary to his federal Due Process guarantees, applied current ORS 109.119 to deprive him — an otherwise fit legal parent, who had physical custody of his children for more than a year prior to the custody hearing — of his children. App I-3-5.

Secondly, father asserted that the Oregon court's application of a simple "totality of evidence" test, deprived father of his federal Due Process guarantees. App I-5. Father argued that where a parent is found to be "fit", federal Due Process requires a heightened rebuttal showing of "extraordinary or exceptional circumstances." App I-7,8.

Third, father asserted that the Oregon Supreme Court's decision, in reviewing the record *de novo*, shifted the burden of proof and persuasion onto an otherwise fit custodial parent, contrary to the *Troxel* holding and Due Process guarantees of the Fourteenth Amendment to the United States Constitution. App I-5,6.

The Oregon Supreme Court denied father's Petition for Reconsideration on July 27, 2004. App F-2.

REASONS FOR GRANTING THE WRIT

I. INTRODUCTION

This petition requests the Court's intervention and review of a pivotal Oregon family law case because "a substantial federal question...transcends or exists apart from the family law issue...." See *Elk Grove Unified School District v. Newdow at. al.* 542 US ___, 124 S Ct 2301, 2309 (2004). Father's "interest in retaining custody of his children is cognizable and substantial." *Stanley v. Illinois*, 405 US 645, 652 (1972)

The substantial federal question arises from flawed

methodology applied by the Oregon Supreme Court in weighing the evidence to determine whether the statutory parental presumption at current ORS 109.119 (2) (a) (App G-1) — that a legal parent acts in the child's best interest — has been rebutted. Misapplication of the *Troxel* methodology resulted in an award of custody of an otherwise fit custodial parent's children to a private third-party. The Oregon court's second-guessing of this fit custodial father's child-rearing decisions falls far short of this Court's admonition in *Troxel* to elaborate with care third-party custody and visitation standards.

In this case, the trial court terminated father's custody after his children had received parental care, support and direction fully meeting their needs. More significantly, the children demonstrated no emotional or behavioral problems while in their father's custody or from the separation from their grandparents during their six-week stay in Montana. App D-11-12

The Oregon trial court and Supreme Court fact-finding processes fail to pass constitutional muster in the context of *Troxel* and other case holdings of this Court.

One example of this failure and of the conflict and stress now placed upon the children and their parents is illustrated where a fit custodial parent has need to move in order to support his or her family. App A-4. These moves may now be second-guessed by judges (and by third parties: App A-33) who, for their own reasons, feel that such moves are "abrupt and undertaken with minimal planning or consideration of the interests of the children." App A-35

A fit parent's choice of a domestic partner may also be second-guessed by judges (and by third parties: App A-32) who, for their own reasons, feel that the parent "has too rapidly secured an unproven partner, with many similar issues, in an effort to set up a home for the children." Finding 41; App B-9

The *Troxel* plurality opinion, with Justice Thomas

concurring, held that the Washington visitation statute "as applied" [to the parent] and her family...unconstitutionally infringes on [a] fundamental parental right". *Supra* 530 US at 67 (bracketed matter and emphasis added). Rather than deciding this case based upon the statute's facial unconstitutionality, *cf. supra* 530 US at 75-79 (Souter J., concurring), this Court held that the case turned upon "the specific manner in which that [visitation] standard is applied...." *Supra* 530 US at 73 (bracketed matter added). The same analysis pertains to this case.

The 2001 Oregon Legislative Assembly enacted a constitutional "*Troxel* fix" to Oregon's psychological parent statute at current ORS 109.119. App G-1-5. The statute authorizes any third-party who establishes a child-parent relationship, current ORS 109.119 (10) (a), to request — and a judge to award — custody whenever the court properly finds by a preponderance of evidence that the parent has failed to make child-rearing decisions in the child's best interest.

The Oregon statute's five non-exclusive substantive rebuttal standards are set forth at current ORS 109.119 (4) (b) App G-3

However, the Oregon Supreme Court's application of the Oregon "psychological parent" statute radically departs from this Court's guidance given in *Troxel*: state trial courts must give special, significant or material weight to a fit parent's child-rearing decisions by making more than "slender findings" and must also give additional weight to a fit custodial parent's decisions by allocating the burden of proof and persuasion onto the third-party, rather than the fit parent. *Supra* 530 US at 72.

The Oregon Supreme Court concluded that the Due Process right that this Court "affirmed in *Troxel* is important, but limited:...." App A-41. Much of the Oregon court's analysis focused upon the statutory rebuttal criteria at current ORS 109.119 (4) (b), and how the "evidence will vary." App

A-27. Most troublesome is that no analysis was made of the Court of Appeals' earlier findings relating to father's child-rearing decisions (App D-11-13) — the findings which give shape and substance to the *Troxel* presumption itself.[1] Current ORS 109.119 (2) (a). See, *Troxel*, 530 US at 71-72 (discussing findings regarding the parent's visitation decisions.) The Oregon court failed to give any of this fit custodial father's child-rearing decisions any special weight whatsoever.

Guidance by this Court is needed to give state courts a clear road map in private third-party custody adjudications: What weight is to be given to findings regarding a fit custodial parent's child-rearing decisions? What minimum burden of proof is constitutionally required to rebut the parental presumption? What type of showing or evidence is necessary to overcome the parental presumption where the legal parent has been found to be a fit custodial parent?

Previously, where a state court has failed to accord special weight to the decisions of a fit parent, this Court has granted certiorari, vacated the judgment and remanded to the state court for further consideration in light of *Troxel v Granville*, 530 US 57 (2000). See, eg., *Dodge v Graville*, 533 US 945 (2001). The weightier parental interest implicated in a private third-party custodial adjudication requires no less diligence to insure that a state court decision does not radically depart from this Court's *Troxel* holding, especially where that state's decision accords a fit custodial parent's child-rearing decisions no special weight.

II. The Court should resolve the conflict between this Oregon custody decision and the *Troxel* visitation decision, to decide what weight is to be given to the

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1 See, Oregon Court of Appeals findings of fact discussed, supra at pp 5-6

child-rearing decisions of a fit custodial parent which are consistent with the child's best interest.

In *Troxel v. Granville*, 530 US 57 (2000), this Court's plurality opinion held that "fitness" means "adequately car[ing] for his or her children." *Supra* 530 US at 68. The plurality opinion states "that there is a presumption that fit parents act in the best interest of their children." Where a parent is found to be fit, "there will be normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." (citing *Reno v. Flores*, 507 US at 304). *Troxel, supra* 530 US 68-69. *Troxel* was a visitation case where the parent was found to be fit; this is a custody case involving a fit parent. The fact that this custodial father was found to be a fit parent of his children is an important fact and gives the *Troxel* presumption additional weight and force.

Generally, a child may not be "removed from the custody of its parents so long as they [are] providing for the child *adequately*." *Reno v. Flores, supra* 507 US at 304 (bracketed matter added, italics in original). The federal Due Process Clause, then, includes a "substantive component, which forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores, supra* 507 US at 302 (emphasis in original). This Court, in *Troxel,* also characterized a fit parent's liberty interest implicated in a visitation case as a "fundamental liberty interest." *Troxel, supra* 530 US at 65-66.

The decision of the Oregon Supreme Court posits that "*Troxel* holds only that the Due Process Clause requires that 'some special weight' be given to the interest of the legal

parent..." in a custody adjudication context (App A-25), but concludes that this Court's plurality opinion "did not elaborate on the nature or extent of the 'weight'". App A-17.

The Oregon Supreme Court's decision concludes that the statutory "*Troxel* fix" at current ORS 109.119 (2) (a) ("that the legal parent acts in the best interest of the child") is all that is required to protect father's Due Process rights. App A-41.

More than just "facial" statutory safeguards are needed to protect the fit parent's fundamental liberty interest. The Oregon Supreme Court failed to apply the statute in such a manner so as to give special weight to this father's child-rearing decisions — to require courts to make findings to provide necessary Due Process contours to the *Troxel* presumption.

A careful reading of this Court's decision in *Troxel,* as well as an examination of current ORS 109.119, reveals that a substantial conflict exists between this Court's admonition in *Troxel* — to give special weight to a fit parent's decision-making — and the Oregon Supreme Court's interpretation of that admonition. The Oregon court erroneously concluded that its application of the state statute provides all the weight needed to be given to "the interest of a parent..." App A-41. It also erroneously concluded that this Court failed to "elaborate on the nature or extent of that 'weight'". App A-17.

The *Troxel* plurality opinion holds that "the court must accord at least some special weight to the parent's own determination," *Troxel, supra,* 530 US at 70; "the Washington Superior Court failed to accord the determination of[] ...a fit custodial parent[] any material weight", *supra,* 530 US at 72, and that the court's "slender findings in combination with the court's announced presumption in favor of grandparents' visitation and its failure to accord significant weight to the [fit parent's offer] of meaningful visitation...", *Id* (bracketed matter and emphasis added), did not comport with Due Process.

This Court's discussion of the weighing of the evidence in *Troxel,* in the context of the application of the statutory parental presumption, does not focus solely upon giving the parent's "interest" a special "statutory" weight. The plurality opinion of *Troxel* focuses, instead, upon the more precise weighing by the fact finder of the parent's specific child-rearing decisions, determinations and actions, especially when the fit parent has custody of his or her children. Determinations of a legal parent are to be given special, significant or material weight by the court, as reflected in its findings. Those child-rearing decisions are given "special weight" when the fact finder makes findings which can be meaningfully weighed against the rebuttal findings.

Secondly, courts are instructed to avoid making "slender findings" which can lead to erroneous infringement of a parent's fundamental right to make child-rearing decisions. *Troxel, supra,* 530 US at 72. Instead, child-rearing decisions of the parent are to be accorded special deference as reflected in the trial court's findings, especially if the parent is found to be fit, as was the case here. *Troxel, supra,* 530 US at 90 ("...I think it safe to assume that trial judges usually give great deference to parents' wishes..."; Stevens, J. dissenting.)

Absent such "*Troxel* findings" the trier of fact has nothing against which to weigh the rebuttal findings, to determine if those rebuttal findings, indeed, preponderate to rebut the parental presumption.

Third, the purpose of the *Troxel* evidentiary procedural safeguards is to prevent the trier of fact from shifting onto a legal and "fit custodial parent, the burden of *disproving* [that custody with the third party] would be in the best interest of [his children]." *Troxel,* 530 US at 69 (bracketed matter added).

Examination of current ORS 109.119 reveals how the

Oregon legislature incorporated the *Troxel* fix in order to make the statute facially constitutional. First, "there is a presumption that the legal parent acts in the "best interest of the child". Current ORS 109.119 (2) (a) (App G-1; emphasis added). The statutory presumption focuses upon the parent's actions or acts in reference to child-rearing decisions involving the child.

Next, the statutory presumption may be rebutted by a preponderance of evidence once the third party establishes a child-parent relationship. Current ORS 109.119 (3) (a) (10) (a). App G-2,5.[2]

Finally, the Oregon statute requires the court to enter findings "supporting the rebuttal of the presumption". Current ORS 109.119 (2) (b) App G-2.

An examination of the Oregon Supreme Court decision reveals how that decision fails to apply the three essential principles enunciated in *Troxel*: (1) findings regarding the fit parent's decisions are to be given special weight; (2) the court is to avoid making "slender findings" based upon speculation; and (3) the court is not to engage in shifting the burden onto the legal parent to disprove that custody with grandparents would

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2 A lower preponderance evidentiary standard is utilized in conjunction with five non-exclusive substantive rebuttal standards listed at current ORS 109.119 (4) (b). App G-2. The lower evidentiary standard is utilized because the child's liberty interest is implicated to a greater degree once the third party establishes a child-parent ("psychological parent") relationship, as opposed to a mere "ongoing personal relationship," where the third party seeks visitation contact with the child. In the later situation, the third party must rebut the parental presumption by the higher clear and convincing evidentiary burden. Current ORS 109.119 (3) (b) (10) (e). App G-2,5. See, Schuster II, Philip F, "Constitutional and Family Law Implications of the *Sleeper and Troxel* Cases: A Dénouement for Oregon's Psychological Parent Statute? 36 *Will. L. Rev.* 549, 647-658, 661,677-680 (2000; published 2001, hereinafter 36 Will. L. Rev.)

be in the children's best interest.

In the instant case, the Oregon Supreme Court fashioned a new standard of harm, holding that grandparents must demonstrate by a preponderance of evidence that the custodial parent poses a "serious present risk of psychological, emotional or physical harm to the child." (emphasis added). Compare App A-32, with current ORS 109.119 (4) (b) (C) (10) (b).

However, when applying its "serious present risk of harm" standard to the specific facts of this case, the Oregon Supreme Court found that father's circumstances pose only a "serious risk (sic) of psychological or emotional harm to the children" App A -33,34. The Oregon Supreme Court failed to examine whether any present or recent actions or child-rearing decisions by father posed a present serious risk of harm to his children. No special, significant or material weight was given to this fit parent's child-rearing decisions while he had custody of his two children from approximately July, 1999 through July, 2000. Evidence and testimony presented to the trial court demonstrated that father had properly exercised his parental rights in making decisions serving the best interests of his children.[3]

No substantive evidence was offered by grandparents or considered by the trial court demonstrating that father's

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3 Neither the trial court nor the Oregon Supreme Court entered findings regarding father's solid child-rearing decisions and his lack of danger to the children, as substantiated by independent, credible lay witnesses (App D-11-13) who testified at the trial court hearing (App B-2); Craig Schreiter (father's grief counselor for his children); Officer Sweet (Marion County Sheriff's Deputy); Kathy Harris (trailer home operator); Ms. Zicker (older child's first grade teacher); Dan Wentworth (father's employer); Wende Thomas (father's child care provider); Officer Lyle (Washington County Deputy Sheriff).

decisions were not intended to serve the best interests of his children or that his actions had reflected any lack of love, unconcern for the welfare of his children or unwillingness to provide a good living environment for his children.

No special weight was given to father's decision to continue grief counseling for his children, even when he moved the children from the jurisdiction of Oregon to Montana. App D-12,13.

After father returned to Oregon with his children, no special weight was accorded to father's decision to move from his parent's residence in Mill City to a permanent home in Lyons, Oregon and to remain there. App A-5; App D-4.

No special weight was given to father's decision to enroll his oldest child in school and the fact that his oldest child was doing well in school. App D-11. Likewise, no special weight was given to father's decision to enroll his youngest daughter in daycare and the fact that she was also doing well. App D-11.

No special weight was accorded to father's fostering visitation and close contact with grandparents both before and after he had custody. App A-35,36.

Finally, no special weight was given to the fact that father and his girlfriend are leading a safe, drug free lifestyle. There was no evidence of any physical, psychological or emotional abuse or danger testified to by any of the independent witnesses or by the expert psychologist who did a custody evaluation. App D-12.

Instead, the trial court and the Oregon Supreme Court shifted the burden onto father, a fit custodial parent, to prove to the court that he had somehow overcome his purported deficiencies.

Specifically, father was obliged to "convince" and to "satisfy" the trial court that he had overcome his so-called

shortcomings (Findings 9 and 40; App B-3,9; App A-6), and that his girlfriend had overcome her alleged problems. (Finding 35; App B-8).

Father was obliged to prove to the trial court that father's family was not a "potential threat to the children." (Finding 39) App B-9. Father was obliged to persuade or to convince the trial court that all of the so-called "dangers" that father allegedly presented to the children in the past were no longer present. (Findings 41, 42) App B-9,10.

Father was obliged to "convince" or to persuade the trial court that his temporary removal of the children to Montana for six weeks, depriving grandparents of contact, would no longer occur. (Finding 50) App B-12, App A-37.

Both the trial court and the Oregon Supreme Court found that father failed to carry his burden, despite the fact that he did not remove the children while he had physical custody for over a year prior to the trial court hearing, and despite the fact that the trial court had ample jurisdiction to order a parenting plan restricting father from removing the children from the state, had father been originally awarded custody. See, removal provision in parental plan order at App B-22.

The Oregon Supreme Court's justification for grandparents' rebuttal of the parental presumption, and award of custody to grandparents, relies on the kind of "slender" fact-finding disapproved by this Court in *Troxel.* Those findings rely upon a single, brief (six-week) removal by father of the children from the jurisdiction of Oregon to Montana. Father promptly obeyed the court's order to return to Oregon. App D-4. No consideration was given to father's reasons for leaving the jurisdiction in the first place, given the context of the acrimonious custody dispute with grandparents (Findings 25-27; App B-6,7), sparked by a prior *ex parte* order giving them custody, an order which was subsequently vacated. App B-7.

The trial court's slender findings, adopted by the Oregon Supreme Court, also rely upon speculation or upon remote circumstances — supposedly illustrating the shortcomings of father, father's girlfriend and father's extended family — prior to the time that father had physical custody of his children. The trial court and Oregon Supreme Court speculated that the children had been and would continue to be emotionally and psychologically harmed by their inability to routinely associate with grandparents if father were awarded custody. In making these slender, subjective findings, the Oregon Court failed to weigh the relative harm to the children and to father resulting from his sudden loss of custody of the children.

Although, on *de novo* review, the Oregon Supreme Court gives considerable weight to the trial court's findings of fact and credibility (App A-3), neither the trial court nor the Oregon Supreme Court made any findings giving "special weight" to the decisions of father. Unlike the Court of Appeals (App D-11-13), neither the trial court (App B) nor the Oregon Supreme Court (App A-3-5) made any findings of fact in accordance with independent testimony which demonstrated father's positive child-rearing decisions.[4]

While the custody evaluator concluded that father is able to adequately care for his children (App A-30), the trial court found that father and father's family posed a potential, if not sufficient, danger. Findings 39 and 42; App B-9,10. These speculative or "slender" findings were based upon more remote circumstances and upon the expert's across-the-board use of a best interest custody evaluation. As mentioned, this evaluation was given less weight in the context of the *Troxel* holding (App

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4 See footnote 3, *supra* at p.18

D-10, note 9), in that it "relied on the wrong standard,...." App E-7 (note 3).

This Court has previously held that such an overall custody adjudication procedure, which precludes the determinative issues of a parent's ability to raise and care for his or her child, cannot stand:

> "Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand."

Stanley, supra, 405 US at 656-657 (emphasis added).

Here, the weightier "*Troxel* findings" made by the Oregon Court of Appeals (App D-11-13)[5] — which reflected "present realities" while this father had custody — were never weighed against the rebuttal findings of the Oregon Supreme Court. Consequently, the more "slender" rebuttal findings were applied to deprive this father of custody of this two children, in violation of his guarantees to substantive and procedural Due Process.

III. To secure and stabilize parental rights and relationships with children in third-party custody cases, this Court should supplement the *Troxel* standard with the dominant opinion and contemporary practices of

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5 See, findings listed herein, *supra* at pp. 5-6

the fifty states, which require either a showing of unfitness or a showing of exceptional or extraordinary circumstances detrimental to the child to rebut the *Troxel* parental presumption.

This Court in *Troxel* cautioned that the quantum of harm or potential harm necessary to rebut the parental presumption is "best 'elaborated with care'" by the states "on a case-by-case basis". *Troxel, supra,* 530 US at 73. This admonition highlights that substantive rebuttal standards as well as evidentiary standards, utilized in conjunction with the *Troxel* presumption, do matter. State courts must take heed in applying the substantive and evidentiary standards in order to give their application a presumption of validity under the Due Process Clause.

Notwithstanding the finding by all the courts below that father was a fit parent, current ORS 109.119 (4) (b) (A), (see App A-29-30; App D-10; App B-9), the Oregon Supreme Court concluded that grandparent's had rebutted, by a preponderance of evidence, the presumption that father acts in the best interest of the children by considering each of the remaining statutory rebuttal factors when taken "as a whole". App A-28,38. The Oregon Supreme Court placed particular emphasis on three of the substantive rebuttal standards: grandparents' role as primary caretakers to the children after mother's death; father's denial of contact between the children and grandparents by moving the children to Montana for six weeks; and the alleged serious risk of psychological or emotional harm to children posed if father were granted custody. Current ORS 109.119 (4) (b) (B) (C) (E). App A-30-37. The Oregon court held that these circumstances, "when taken as a whole, rebut[] the presumption." App A-38.

In analyzing what process is due a fit custodial parent

when current ORS 109.119 is applied to the facts of this case, the methodology of this Court established in *Mathews v. Eldridge*, 424 US 319, 335 (1976) proves helpful.

First, consideration is given to the private interests at stake which are implicated by the statute, current ORS 109.119. Father, as a fit custodial and legal parent, enjoys a weighty and fundamental interest in the care, custody and control of his children. *Troxel, supra,* 530 US at 65-66 "The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection...[and] 'come[s] to this Court with a momentum for respect'....." *Stanley, supra*, 405 US at 651.

The children's liberty interest is conjoined with the state's interest as *parens patriae* to safeguard its children within its jurisdiction. *Stanley, supra*, 405 US at 652. See, also *Schuster, supra* 36 Will. L. Rev. at 647-657. The parent's liberty interest is embodied in the *Troxel* presumption and the statute's employment of heightened substantive rebuttal criteria at current ORS 109.119 (4) (b). App G-3. The child's liberty interest is balanced with the parent's interest and is embodied by the lower preponderance evidentiary standard utilized to rebut the *Troxel* presumption. Current ORS 109.119 (3) (a). The child's interest is also implicated by the statutory child-parent relationship. Current ORS 109.119 (10) (a). Both the parent's and the child's liberty interests outweigh the statutorily-defined intervenor interest of grandparents in this case.

The second *Mathew's* test is the risk of erroneous deprivation occasioned by the Oregon Supreme Court's fact-finding methodology in applying the rebuttal factors at current ORS 109.119 (4) (b). *Supra*, 424 US at 335 The risk of erroneously depriving a fit custodial parent of his children by

employment of this "evidence-as-a-whole" weighing methodology is enormous.

First, the Oregon Supreme Court found father, here, to be "fit" – that "father plainly is willing to care for the children,..." as substantiated by "the report and testimony of the court appointed psychologist,...." App A-30 (emphasis added). This finding contradicts and is completely inconsistent with the court's general finding that father, somehow, poses a "serious present risk of psychological or emotional harm" to the children. App A-33 (emphasis added).

Most troublesome, however, is the Oregon Supreme Court's holding that "the evidence in support of each identified factor (and any other evidence relevant to rebutting the presumption), when taken as a whole, rebuts the presumption." (emphasis added) App A-38.

A proper Due Process analysis of this evidence-weighing rule involves consideration of the probable value of additional or substitute procedural safeguards. *Mathews, supra*, 424 US at 335.

In fashioning this evidence-weighing rule, the Oregon court grappled with the difficult task of balancing the parent's fundamental liberty interest in the care, control and maintenance of his children with the liberty interest of the children, while minimizing the risk of erroneously depriving the children of a safe, nurturing environment.

Since we do not live in a perfect world, children are likely to be exposed to some quantum of harm, whether they live with their parents, no matter how adequate the parental care. See e.g. *Clark v. Wade,* 544 SE 2nd 99, 107-108 (Ga 2001) ("...[T]he death of a parent, divorce or a change in home or school, will often be difficult for a child, but some level of stress or discomfort may be warranted when the goal is reunification of the child with the parent."). "...[E]ven a fit

parent is capable of treating a child like a mere possession." *Troxel, supra* 530 US at 86 (Stevens J, dissenting).

It is therefore important that where the legal custodial parent is found to be "fit", that the statute provide an alternative "safety valve" procedure to reduce the risk of erroneously depriving the child of a safe, nurturing environment.

Significantly, *Troxel* and other decisions of this Court instruct us that such a "safety valve" rebuttal showing will "normally" not be made. *Troxel*, supra 530 US at 68. "Our cases leave no doubt that parents have a fundamental liberty interest in caring for and guiding their children, and a corresponding privacy interest — absent exceptional circumstances — in doing so without the undue interference of strangers to them and to their child." *Supra* 530 US at 87. (Stevens J., dissenting; emphasis added). Moreover —

> "We have little doubt that the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.'"

Quilloin v. Walcott, 434 US 246, 255 (1978)

The issue, then, is whether or not the "individual interests at stake" in this psychological parent custody proceeding — here, a fit custodial father's interests — "are both particularly important and more substantial" than the other statutory rebuttal factors when "taken as a whole." *Santosky v. Kramer,* 455 US 745,756 (1982). May these other rebuttal criteria, when simply "taken as a whole," constitutionally overcome the *Troxel* presumption, where a lower preponderance evidentiary standard favors the child's interest? Guidance is necessary to give the fact finder "'the degree of

confidence our society thinks he should have in the correctness of factual conclusions for'" these psychological parent custody adjudications. *Addington v. Texas*, 441 US 418, 423 (1979).

In order to properly evaluate the permissible Due Process contours of such a substitute rebuttal "safety valve", this Court has established a constitutional principal in *Rivera v. Minnich*, 483 US 574, 578 (1987) which assists our analysis:

> "A legislative judgment that is not only consistent with the 'dominant opinion' throughout the country but is also in accord with 'the traditions of our people and our law' (citation omitted), is entitled to a powerful presumption of validity when it is challenged under the Due Process Clause of the Fourteenth Amendment"

This "dominant opinion" principal involves an examination of the "dominant opinion" of legislative enactments and judicial opinions which are "in accord with 'the traditions of our people and our law.'" The Court looks to "history and contemporary practices" to determine whether procedural standards comport with Due Process. *Connecticut v Doehr*, 501 US 1, 23 (1991)

Besides *Rivera,* this Court has utilized the "dominant opinion" principal to assist it in deciding whether or not other statutory standards, such as the quantum of proof or rebuttal standards, appropriately comport with the Due Process Clause. *Rivera, supra* 483 US 578 (noting that a majority of American jurisdictions employ the preponderance of evidence standard in paternity litigation); *Santoski, supra* 455 US at 749-750 (utilizing this "mainstream" principal in adopting a clear and convincing statement of proof in termination of parental rights proceedings); *Addington v. Texas, supra* 441 US at 431-432 (utilizing the principal to establish the clear and convincing minimum burden of proof in mental commitment proceedings).

The *Troxel* plurality opinion also utilized this principal to illustrate that the Washington trial court's methodology in weighing the fit parent's visitation decisions did not comport with federal Due Process. *Troxel, supra* 530 US at 70-72.

An examination of the mainstream or "dominant opinion" of the fifty state jurisdictions throughout our Nation which employ rebuttal criteria to overcome the parental or *Troxel* presumption should assist this Court. The fifty-state survey indicates that, by far, the largest percentage of states require either a showing of unfitness or a showing of exceptional or extraordinary circumstances detrimental to the child's interest, in order to rebut the *Troxel* presumption. See App H-1-4.

A Due Process problem arises where a weak "safety valve" rebuttal standard is utilized in conjunction with the lower "preponderance" evidentiary standard.

The Oregon Supreme Court employs an amorphous "totality of evidence" test, linked with the lower preponderance of evidence standard, for rebutting the *Troxel* presumption. Where father, here, was found to be "fit", application of such a procedural method does not pass federal Due Process muster for several reasons. First, the "dominant opinion" in the Nation, which is given a strong Due Process presumption of validity, reveals that once a parent is found to be "fit", in order to rebut the parental presumption, the evidence of other non-exclusive rebuttal factors must preponderate to show a totality of "extraordinary or exceptional circumstances." Such heightened scrutiny, employing a higher substantive rebuttal showing, will minimize the risk of erroneously depriving a fit parent of his or her fundamental liberty interest as well as erroneously depriving the child of parental companionship.

Secondly, the enormous risk of erroneous deprivation by failing to utilize a heightened "safety valve" showing is

illustrated by the decision of the Oregon Supreme Court. The totality of rebuttal evidence, when taken "as a whole" — and affording father's child-rearing decisions, while he had custody, the special weight they deserve[6] — does not come anywhere near constituting "extraordinary or exceptional circumstances" such as to justify rebuttal of the *Troxel* presumption.

The third *Mathews* test involves consideration of the fiscal and administrative burdens imposed upon the State by private third-party custody adjudications made pursuant to the Oregon statute, current ORS 109.119, and applying the evidence-weighing rules of the Oregon Supreme Court's decision. *Mathews, supra,* 424 US at 335. This third test involves consideration of the state's dual interest as *parens patriae* to safeguard children within its jurisdiction, while protecting the integrity of the family unit.

The state's dual interest becomes less weighty when the State is not a party to a private, third-party custody proceeding, as opposed to a juvenile or termination of parental rights proceeding. Obviously, if custody with a legal parent poses "extraordinary or exceptional circumstances", there is an available and involved custodian (private third-party), rather than the more impersonal State.

On the other hand, the state's interest in fashioning its statute to protect a parent's fundamental liberty interest, while ensuring that it is properly applied, is important. At stake is the enormous fiscal impact of misapplication of statutory rebuttal standards during third-party litigation in the state court system. Here, the Oregon Supreme Court concluded that this Court in *Troxel* left "undefined" the "less exacting standard" for heightened scrutiny of state actions that intrude upon a parent's

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6 See discussion, *supra* at pp. 18-19

fundamental liberty interest. App A-17. Clarification is therefore needed to define with more exactness the heightened scrutiny necessary where a fit custodial parent's fundamental liberty interest is implicated in a private, third-party custodial adjudication.

This Court in *Troxel* cited with approval *Reno v. Flores, supra,* which sets forth the lowest parameter of heightened scrutiny — the "reasonable fit" test: "a 'reasonable fit' between the governmental purpose...and the means chosen to advance that purpose." *Supra* 507 US 305. At the other end of the heightened scrutiny spectrum is the strict scrutiny test advanced by Justice Thomas in his concurring opinion in *Troxel, supra* 530 US at 80.

In failing to achieve even a "reasonable fit" for father's weighty fundamental liberty interest, the Oregon Supreme Court's decision accomplishes precisely what this Court said would offend the Due Process Clause: it forces the breakup of a fit custodial parent from his two children without a showing of unfitness and for the sole reason being the children's best interest. *Quilloin v Walcott, supra* 434 US at 255.

A bright line, nationally uniform substantive "safety valve" rebuttal standard (where the legal parent is found to be fit) will make state court "psychological parent" custody disputes far less expensive and time consuming.

Substantive and procedural Due Process require that a strong presumption of Due Process validity be accorded the Nation's "dominant opinion": where a legal parent is found to be fit, other detrimental circumstances preponderating to rebut the *Troxel* or parental presumption must rise to the heightened level of "extraordinary or exceptional circumstances."

CONCLUSION

The Court should grant the Petition for Writ of Certiorari and reverse the decision of the Supreme Court of the State of Oregon.

Respectfully submitted
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FILED: June 10, 2004

IN THE SUPREME COURT OF THE
STATE OF OREGON

In the Matter of the Marriage of

RAYNE ELIZABETH O'DONNELL-LAMONT (deceased),	) C98 1284 DR) CA A112960) SC S50551
Petitioner,	)
and	)
MICHAEL DAVID LAMONT, JR.,	)
Respondent on Review,	)
and	)
CHRISTINE AND PATRICK O'DONNELL,	)
Petitioners on Review,	)
and	)
DARRELL MILLER,	)
Intervenor-Respondent.	)

On review from the Court of Appeals.*

Argued and submitted January 12, 2004.

Eli D. Stutsman, Portland, argued the cause and filed the brief for petitioners on review. With him on the brief were David L. Heifetz, Jacqueline Koch, and Koch & Deering.

Philip F. Schuster II, of Dierking & Schuster, Portland, argued the cause and filed the brief for respondent on review.

F.G. (Jamie) Troy II, of Law Office of Ronnee S. Kliewer,

Portland, filed the brief for *amicus curiae* Basic Rights Oregon, Inc. With him on the brief was Shaun Wardinsky, of Yates, Matthews & Marasch, P.C., Portland.

Darcia Krause, Portland, filed the brief for herself as *amicus curiae*.

Before Carson, Chief Justice, and Gillette, Durham, Riggs, De Muniz, and Balmer, Justices.**

BALMER, J.

The decision of the Court of Appeals is reversed, and the judgment of the circuit court is affirmed.

*Appeal from Washington County Circuit Court, Steven L. Price, Judge. 184 Or App 249, 56 P3d 929 (2002), *modified and adhered to as modified by an equally divided court*, 187 Or App 14, 67 P3d 939 (2003).

**Kistler, J., did not participate in the consideration or decision of this case.

BALMER, J.

We allowed review of this child custody proceeding to consider the appropriate application of changes that the legislature made to the third-party custody statute in 2001, following the United States Supreme Court's decision in *Troxel v. Granville*, 530 US 57, 120 S Ct 2054, 147 L Ed 2d 49 (2000). The trial court awarded custody of the two children in this proceeding to maternal grandparents (grandparents) rather than to father, and the Court of Appeals reversed. *O'Donnell-Lamont and Lamont*, 184 Or App 249, 56 P3d 929 (2002), *modified and adhered to as modified by an equally divided court*, 187 Or App 14, 67 P3d 939 (2003).

For the reasons that follow, we reverse the decision of the Court of Appeals and affirm the judgment of the trial court.

I. FACTS

In reviewing a decision of the Court of Appeals that is an appeal from a suit in equity, this court may review *de novo* or may limit its review to questions of law. ORS 19.415(4); *see State ex rel SOSCF v. Stillman*, 333 Or 135, 138, 36 P3d 490 (2001) (reviewing termination of parental rights case *de novo*). In this case, we elect to review the record *de novo*, because the Court of Appeals did not address all the issues that we conclude must be considered (including certain issues that depend on factual findings), and our reversal of the decision of the Court of Appeals on dispositive issues that it did consider otherwise would require a remand to that court and the delay that necessarily would attend further proceedings. [1] In our *de novo* review of the record, we give "considerable weight to the findings of the trial judge who had the opportunity to observe the witnesses and their demeanor in evaluating the credibility of their testimony." *State ex rel Juv. Dept. v. Geist*, 310 Or 176, 194, 796 P2d 1193 (1990). We first review the facts leading up to this custody dispute and then supplement those facts from the record as needed in our discussion of the applicable legal standards.

We find the following facts. Father and mother were married in 1991 and had two children -- Taryn, born in 1992, and Seaira, born in 1996. Father and mother lived with grandparents for several months after Taryn was born, then

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1 We also note that the parties agreed at oral argument in this court that the factual record developed in the trial court was sufficient to resolve the issues in this case and that a remand to the trial court to take additional evidence is unnecessary.

moved to the Detroit Lake area near the paternal grandfather. In 1994, mother and Taryn, and later father, moved to Tualatin and then to Hillsboro. In both locations, the family lived within walking distance of grandparents, and the children had day-to-day contact with grandparents during much of that time. The family chose to live near grandparents in part because mother suffered from a congenital heart defect, which later caused her death, and grandparents provided childcare as well as emotional and, at times, financial support. Mother was the primary caregiver for the children, in part because father worked as a long-haul truck driver, which required him to be away from home several nights a week. At other times during the marriage, father worked as a contractor and as a construction worker at job sites that required him to be away from home.

Parents' marriage began to deteriorate in 1997, and father and mother separated and reunited on several occasions. In March 1998, mother obtained a Family Abuse Prevention Act restraining order against father, although mother apparently enforced the order only when it suited her, and both mother and father ignored the order at other times. For example, mother and father traveled together to Hawaii with the children in July 1998, despite the restraining order and the fact that, in April 1998, mother had petitioned to dissolve the marriage. The dissolution of parents' marriage became effective in September 1998. Father had moved to Eugene, however, and did not take advantage of all the parenting time provided for in the dissolution decree. Twice during father and mother's last separation, father violated the restraining order in a manner that was alarming or threatened violence to mother. On one of those occasions, father appeared at mother's residence when mother and children were there. The police subsequently arrested him, and he pled guilty to violating the restraining order.

After the dissolution, mother began a relationship with Darrell Miller. In March 1999, Miller, mother, and the children went to Disneyland. While they were there, mother died of her preexisting heart condition. Miller and the children returned to Oregon, where father and grandparents met them.

At the time of mother's death, father was working in Eugene and living in a trailer. Father acknowledged that his living situation was not appropriate for the children, and father and grandparents agreed that the children would stay with grandparents. Although father and grandparents at one point anticipated that the children might live with grandparents for as long as several years, during the summer of 1999 father reasserted his right to custody of the children, which grandparents disputed. The parties attempted unsuccessfully to mediate their dispute, and the children became the subject of a tug of war between father and grandparents. In July 1999, father refused to return children to grandparents after a visit, without telling grandparents in advance. Later that month, grandparents, while in possession of the children, sought and received a court order awarding them temporary custody. The court ordered the children returned to father, who by that time had acquired a house in Keizer. Father assured the court that he would keep the children in the Salem area. However, despite that promise, father moved to Montana with the children and his girlfriend, Laura Oliver, in September 1999, without notice to the court or grandparents. Father refused to disclose his address in Montana to grandparents and avoided grandparents' efforts to serve him with legal papers. The court found father in contempt and ordered him to return the children to Oregon, which he did. After living in Montana for about six weeks, father, Oliver, and the children moved to the Detroit Lake area, and father and Oliver later purchased a house in Lyons.

II. PROCEEDINGS BELOW

After a hearing on the merits, the trial court in July 2000 awarded permanent custody to grandparents, with substantial parenting time to father. The trial court issued a letter opinion making extensive findings of fact. The trial court relied on the testimony of the parties and numerous other witnesses, including Dr. Edward Vien, a clinical psychologist appointed by the court, who spent 27 hours interviewing family members and conducting psychological tests. The trial court found that the children are bonded to father and to grandparents and that father loves the children, has attempted to provide for them, and has the potential to be a good custodial parent. However, the court also found that father had lied repeatedly during the hearing, had an unstable job and residence history, had used illegal substances during the marriage, had abused mother, and had difficulty controlling his anger. Although father claimed to have overcome those problems, the trial court found that he was "unconvincing." Based on his testimony in the trial court, the trial court found that father was "dishonest" and that he lacked credibility. For those and other reasons, the trial court determined that father had serious shortcomings and deficiencies as a parent.

In regard to grandparents, the trial court found that grandparents had provided the children with food, clothing, shelter, and other physical necessities, as well as care, education, and discipline. The court noted that grandparents had played a "closely supportive role" for many years in helping mother raise the children. The court also found that grandparents had a more constructive interest in, and attitude toward, the children than did father. However, the court also identified several negative factors regarding grandparents, including grandparents' tendency to dote on the children,

their efforts to "control" father and the children, and their desire to prevent father from having the children.

The trial court began its legal analysis with ORS 109.119 (1999), which, at the time of the hearing, established the standards for the court to use in determining whether grandparents had shown "emotional ties creating a child-parent relationship" with the children.[2] Having found that grandparents had proved such a relationship, the court then considered father's argument that, as the biological parent, he had a "supervening right" to custody unless he was shown to be unfit. Father had argued that he was a fit legal parent and

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2 ORS 109.119 (1999) provided, in part:

"(1) Any person, including but not limited to a related or nonrelated foster parent, stepparent or relative by blood or marriage who has established emotional ties creating a child-parent relationship or an ongoing personal relationship with a child, or any legal grandparent may petition or file a motion for intervention with the court having jurisdiction over the custody, placement, guardianship or wardship of that child, or if no such proceedings are pending, may petition the court for the county in which the minor child resides for an order providing for relief under subsection (3) of this section.

"* * * * *

"(3) (a) If the court determines that a child-parent relationship exists and if the court determines by a preponderance of the evidence that custody, guardianship, right of visitation, or other generally recognized right of a parent or person in loco parentis, is appropriate in the case, the court shall grant such custody, guardianship, right of visitation or other right to the person, if to do so is in the best interest of the child. The court may determine temporary custody of the child or temporary visitation rights under this paragraph pending a final order."

The 2001 Legislative Assembly amended ORS 109.119, and we discuss those amendments in detail below. 337 Or at 102-09; see Or Laws 2001, ch 873, §§ 1, 1a, 1e. The 2003 Legislative Assembly also amended the statute, but those amendments do not affect the decision in the case before us. See Or Laws 2003, ch 143, §§ 1-2; ch 231, §§ 4-5; ch 576, §§ 138-39. All subsequent references to ORS 109.119 are to the 2001 version, unless otherwise noted.

that, under *Hruby and Hruby*, 304 Or 500, 748 P2d 57 (1987), the court should award him custody in the absence of a "compelling threat" to the present or future well-being of the children. The trial court rejected that argument, stating that this court's decision in *Sleeper and Sleeper*, 328 Or 504, 982 P2d 1126 (1999), had concluded that the applicable version of ORS 109.119 did not incorporate *Hruby*'s "compelling threat" standard.

Although the trial court rejected the "compelling threat" standard as inconsistent with ORS 109.119 (1999), it nevertheless concluded that, to protect a legal parent's constitutional rights, *Hruby* required a "compelling reason" to grant custody to a psychological parent over a legal parent. The court further noted that a psychological parent could meet the "compelling reason" standard when the legal parent's custody would be "highly detrimental" to the child. Moreover, in applying that standard, the trial court ruled that detrimental *conduct* by the legal parent did not have to be shown; detrimental circumstances would suffice.

Reviewing the facts discussed above, the court found that "father [was] not so unfit as to justify termination of his parental rights" but that, given his shortcomings as a parent and the grandparents' status as psychological parents, it was appropriate for the court to determine custody based on the best interests of the children. Applying the nonexclusive considerations respecting that standard that are listed in ORS 107.137,[3] the court determined that it was in the children's

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3 ORS 107.137 provides a nonexclusive set of factors for courts to consider in determining the "best interests and welfare" of a minor child when deciding to whom to award custody of the child in the context of a dissolution proceeding. Although ORS 107.137 is part of the marital dissolution statute, this court has approved the use of that standard in determining the "best interests of the child" under the third-party custody

best interests for the court to award custody to grandparents, with substantial parenting time to father.

The trial court also addressed the impact of the United States Supreme Court's decision in *Troxel*, which had been decided after the hearing, but before the trial court opinion. As discussed in greater detail below, in *Troxel*, a plurality of the Supreme Court held that the Due Process Clause "protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." 530 US at 66. The Court concluded that a Washington statute that authorized a court to award visitation rights to any nonparent if the "visitation may serve the best interest of the child" unconstitutionally infringed the parent's right to make decisions concerning the child. *Id.* at 75. The Court failed to articulate the scope of the parent's right, holding only that, to meet due process requirements, "at least some special weight" must be given to a fit parent's determination of whether such visitation is in the child's best interest. *Id.* at 70.

The trial court determined that its decision to award custody to grandparents was consistent with *Troxel*. The trial court noted that the Court in *Troxel* had considered a "much broader" state law that would have allowed "any person" to pursue visitation rights and that the plurality opinion expressly had rejected a harm standard, *i.e.*, that the psychological parent must show that the child will be harmed if left with the legal parent for the psychological parent to prevail in a custody dispute. The trial court also pointed out that Oregon's presumption, developed in the custody case law, that a fit parent acts in the best interest of the child, was consistent with *Troxel*'s requirement to "accord at least some

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statute, ORS 109.119. *Sleeper and Sleeper*, 328 Or at 511

special weight to the parent's own determination." 530 US at 70. In the trial court's view, because it had applied the presumption to which father was entitled and nevertheless had determined that it would be in the best interests of the children to award custody to grandparents, its decision complied with the Oregon law then in effect and met the due process requirements as stated in *Troxel*.

Father appealed and, as noted, the Court of Appeals reversed. In the initial panel decision, that court, like the trial court, applied ORS 109.119 (1999) in light of its understanding of *Troxel*. Unlike the trial court, however, the Court of Appeals viewed *Troxel* as raising the standard previously applied in Oregon for qualifying nonparents, like grandparents here, to meet if they are to prevail over fit parents in a custody dispute. 184 Or App at 254-55. Specifically, the Court of Appeals interpreted *Troxel* to require a showing by the nonparents that was more similar to the "compelling threat" standard articulated by this court in *Hruby* than to this court's later, but still pre-*Troxel*, decisions such as *Sleeper*. 184 Or App at 253-56. The Court of Appeals stated:

> "[T]o overcome the presumption in favor of father under ORS 109.119(2)(a) (1997), grandparents must establish that the evidence as a whole preponderates in their favor, that is, that father *cannot or will not provide adequate love and care* for the children or that placement of the children in father's custody *will cause them undue physical or psychological harm*. * * * That means that the court must find by a preponderance of the evidence either that the parent cannot or will not provide adequate love and care or that the children will face an undue risk of physical or psychological harm in the parent's custody."

Id. at 256 (emphasis added). Applying that standard, the Court of Appeals concluded that grandparents' evidence did not rise to the level necessary to overcome the presumption that father would act in the best interests of the children and was entitled to custody. Accordingly, that court reversed the judgment of the trial court and remanded with instructions to award custody to father. *Id.* at 259.

Grandparents petitioned for reconsideration, arguing that the Court of Appeals should have applied the 2001 amendments to ORS 109.119 in its *de novo* review of the trial court decision. As noted, the legislature adopted those amendments after *Troxel*. The amendments replaced the existing statute, which allowed a court to award custody to a nonparent who met certain criteria, if the court determined that custody was "appropriate in the case" and was "in the best interest of the child." ORS 109.119(3)(a) (1999). As discussed in detail below, the 2001 amendments established a statutory presumption that a legal parent acts in the best interest of the child and identified the kinds of factors a court may consider in determining whether a nonparent seeking custody of a child has rebutted that presumption. The 2001 amendments had been adopted after the trial court's decision, but before the argument in the Court of Appeals.

The Court of Appeals, en banc, agreed with grandparents and modified the panel opinion to state that the 2001 amendments "are fully retroactive." 187 Or App at 17. The court was divided, however, regarding the effect of the 2001 amendments on its decision and on the appropriate disposition of the case. Judge Edmonds, the author of the panel decision, joined by three other members of the court, concluded that the result under the 2001 amendments would be the same as the panel's decision, declined to remand for further trial court proceedings under the 2001 amendments,

and adhered to the panel opinion as modified. Three additional opinions were filed. In all, five members of the court adhered to the panel decision, as modified, and five members dissented in part, arguing that the case should be remanded for further development of the record. Because the court was evenly divided, the court adhered to the panel decision as modified.

III. THE 2001 AMENDMENTS TO ORS 109.119

A. *Background*

This court has not been required, prior to this case, to address *Troxel* or the changes to ORS 109.119 that the legislature adopted after *Troxel*. For that reason, it will be helpful to review the nature of the dispute before this court and to examine the Supreme Court's decision in *Troxel*, before turning to our statutory analysis.

This case involves a third-party custody dispute between grandparents and father. In contrast to a proceeding to *terminate* parental rights under ORS 419B.498 to 419B.530, the state is not a party to this case, no one claims that father is "unfit" to be a parent, and father's status as a legal parent is not at issue. The only issue here is custody. Although any decision awarding custody to a third party is a serious intrusion on a parent's right to care for and make decisions for a child, it is less drastic than the termination of the parent-child relationship and, as we discuss below, the statutory standard also is less demanding. *See Stillman*, 333 Or at 149-50 (parental rights may be terminated only if parent is "unfit" and that conduct or condition is "seriously detrimental" to children).

A custody dispute also involves a less significant interference with parental rights than does a juvenile

dependency proceeding in which the court determines that a child is within the jurisdiction of the court based on a finding that a parent has, among other things, abandoned the child or failed to provide "care, guidance and protection necessary for the physical, mental or emotional well-being" of the child, ORS 419B.100(A), (D). In those circumstances, as in a termination proceeding, the state intervenes to relieve a parent of ordinary parental responsibilities and to assume control over decisions about such matters as shelter and health care.

On the other hand, a custody decision involves a greater potential intrusion on parental interests than a decision regarding visitation. Father here has more at stake than whether the children are to spend every other weekend with grandparents. The decision as to who will have primary custody of the children will alter in fundamental, unknowable ways the lives of the children, father, and grandparents. Courts make these difficult decisions fully aware of their potential consequences for all the individuals involved.

Another critical aspect of the background of the 2001 amendments to the third-party custody statute, and therefore of our decision in this case, is the Supreme Court's decision in *Troxel*, to which we now turn. As noted, the parties agree that the 2001 amendments to ORS 109.119 were adopted in response to *Troxel*. We begin with a review of what the Court decided -- and what it did not decide -- in *Troxel*, because that discussion provides important context for construing the amended statute.

In *Troxel*, the Court reviewed a decision of the Washington Supreme Court that had considered three consolidated challenges to a state statute that permitted nonparents to obtain visitation rights if a court determined

that visitation was in the best interest of the child. The Washington court had held that the statute unconstitutionally interfered with the rights of parents to rear their children. That court found the statute to be constitutionally deficient because it permitted the state to interfere with the rights of parents to rear their children without any threshold showing of harm to the children and also because it allowed "any person" to petition for court-ordered visitation of a child at "any time," contrary to a parent's wishes, subject only to a best-interests-of-the-child standard. *In re Smith*, 137 Wash 2d 1, 15-20, 969 P2d 21, 28-31 (1998). The United States Supreme Court affirmed, although it did not adopt the analysis of the Washington Court.

The Court held that the statute, as applied to the facts there, violated the legal parent's fundamental right, protected by the Due Process Clause, to make decisions concerning the child. The Court failed to produce a majority opinion. Justice O'Connor wrote the plurality opinion, in which the Chief Justice and Justices Breyer and Ginsburg joined. The plurality held that the Due Process Clause "protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel*, 530 US at 66. The plurality emphasized, however, that a parent's right to make decisions related to a child is not absolute, but rather provides the basis for a "presumption that fit parents act in the best interests of their children." *Id.* at 68. The problem in *Troxel*, according to the plurality, was "not that the Washington Superior Court intervened, but that when it did so, it gave no special weight at all to [mother's] determination of her daughters' best interests." *Id.* at 69. The plurality stated that, when a decision made by a fit parent is subject to judicial review, due process requires that the court "accord at least some special weight to the parent's own determination." *Id.* at 70.

The plurality, however, provided no specificity as to the extent of the parents' right or the evidence required to overcome the parental presumption. Indeed, the plurality expressly declined to "define * * * the precise scope of the parental due process right in the visitation context." *Id.* at 73. Instead, the plurality stressed the nuance, case-specific nature of the inquiry. It agreed with Justice Kennedy's dissenting opinion that the constitutionality of any standard in this area "turns on the specific manner in which that standard is applied and that the constitutional protections in this area are best 'elaborated with care.'" *Id.*, *quoting* 530 US at 101 (Kennedy, J., dissenting).

Three other members of the Court, although not joining in the plurality opinion, agreed that the Due Process Clause protects parental interests in decisions regarding children, but that the parental interest is qualified. Justice Souter wrote a separate opinion concurring in the judgment. He pointed out that the Washington statute authorized "any person" at "any time" to seek visitation rights "subject only to a free-ranging best-interests-of-the-child standard." *Id.* at 76. Because that statute failed to give any recognition to the due process rights of parents to make decisions regarding their children, Justice Souter stated that the statute was unconstitutional on its face. *Id.* at 76-77. Justice Stevens wrote a separate opinion in which he agreed that parents have a "fundamental liberty interest in caring for and guiding their children," that interest is not absolute, and that the presumption that parents will act in the best interests of their children is a rebuttable one. *Id.* at 86-87 (Stevens, J., dissenting). Justice Stevens dissented, however, because the plurality did not address what he viewed as the Washington Supreme Court's erroneous holding that the federal constitution "requires a showing of actual or potential 'harm' to the child" to overcome the presumption that a fit parent

acts in the best interest of a child. *Id.* at 86. Justice Kennedy dissented for the same reason, stating that the Washington court erred in applying a "harm" standard to overcome the parents' right to make decisions for their children. *Id.* at 94, 101-02.

Justice Thomas concurred in the judgment. He stated that, because the Due Process Clause protects a "fundamental right of parents to direct the upbringing of their children," any infringement of that right is subject to "strict scrutiny." *Id.* at 80 (Thomas, J., concurring). In his view, the State of Washington lacked "even a legitimate governmental interest -- to say nothing of a compelling one -- in second-guessing a fit parent's decision regarding visitation with third parties." *Id.*

Finally, Justice Scalia dissented on the ground that the Due Process Clause provides no protection for "parental rights," and the Washington legislature therefore was free to adopt the "best interest" test that was challenged in *Troxel*. 530 US at 91-92 (Scalia, J., dissenting).

The absence of a majority opinion in *Troxel* and the array of viewpoints expressed in the six different opinions make it difficult to identify the scope of the parental rights protected by the Due Process Clause or the showing that the state or a nonparent must make before a court may interfere with a parent's custody or control of a child.[4] However, two

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4 *See* Emily Buss, *Adrift in the Middle: Parental Rights After Troxel v. Granville*, 2000 Ct Rev 279, 312 (2001) ("A detailed search [of *Troxel*] for some concrete criteria produces a handful of near contentless assertions about what the constitutional protection allows and requires."); The Supreme Court, 1999 Term — Leading Cases, 114 Harvard L Rev 229, 229 (2000) ("[T]he plurality's failure to elaborate on the mechanics of the constitutional standard will leave judges,

conclusions safely can be drawn from *Troxel*. First, with the exception of Justice Scalia, all the members of the Court agreed that the Due Process Clause protects, to some degree, a fit parent's right to make decisions for a child. Second, of the eight justices who recognized a constitutional protection for parental rights, only Justice Thomas concluded that the constitution requires strict scrutiny of state actions that intrude upon those rights.[5] The other opinions articulated an undefined but less exacting standard. As noted, the plurality held that "some special weight" must be given to a parent's determination of what is in the child's best interest, but did not elaborate on the nature or extent of that "weight." Nevertheless, a majority of the Court strongly indicated that the presumption in favor of a parent's decisions was not so strong that it could be overcome only by a showing that the parent poses a risk of harm to the child. As previously discussed, Justices Stevens and Kennedy each expressly rejected the Washington Supreme Court's conclusion that a finding of harm to the child is required to overcome the parental presumption. 530 US at 85-86, 89-90 (Stevens, J., dissenting); *id.* at 94-96 (Kennedy, J., dissenting). Moreover, the plurality declined to consider the lower court's reliance on the "harm" standard, *id.* at 73, but cited with approval various statutes that would be inconsistent with such a standard, *id.* at 70-71.[6]

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legislators, and individual litigants without adequate guidance.").

5 *See* Buss, 2000 Sup Ct Rev at 283 (Except for the separate opinions of Justices Scalia and Thomas, "all four [opinions] recognized some constitutional protection for parental rights, but none suggested that the right is particularly strong.").

6 For a discussion of the consideration of the "harm" standard in the various *Troxel* opinions, see Buss, 2000 Sup Ct Rev at 283, 303-05.

The Supreme Court's decision in *Troxel* led directly to the 2001 amendments to Oregon's statute regulating third-party custody and visitation claims. As previously discussed, ORS 109.119(3)(a) (1999) allowed a court to award custody to a psychological parent if the court determined that custody "was appropriate in the case" and was "in the best interest of the child." That statute was less "open-ended" than the Washington statute at issue in *Troxel*, because it limited the class of third parties who could seek custody or visitation and also because of cases interpreting the statute to impose a presumption in favor of the legal parent. The statute nevertheless appeared likely to draw a constitutional challenge under *Troxel* because it failed to assign any special weight or deference to the legal parent's interest in the custody and control of a child. For that reason, the legislature undertook to amend the statute.

B. *Retroactivity of the 2001 Amendments*

Before we consider the legislature's 2001 amendments to ORS 109.119, we must decide the threshold issue whether those amendments are retroactive and therefore applicable to this case. Grandparents filed the custody petition in 1999, and the trial occurred in 2000. Father argues that the 2001 amendments apply only to custody proceedings in which the petition seeking custody was filed after July 31, 2001, the effective date of the 2001 amendments. As noted, all members of the Court of Appeals rejected that argument, agreeing that the legislature made the 2001 amendments applicable to all custody proceedings filed "before, on or after" July 31, 2001. 187 Or App at 17-18. We agree with the Court of Appeals' determination of that issue and do not address it further.

C. *The Text and Structure of ORS 109.119*

We now turn to ORS 109.119, which establishes the law that we must apply in determining custody as between a legal parent, such as father, and other persons who have established a child-parent relationship with a child, such as grandparents here.[7] That statute provides, in part:

> "(1) [A]ny person, including but not limited to a related or nonrelated foster parent, stepparent, grandparent or relative by blood or marriage, who has established emotional ties creating a child-parent relationship * * * with a child may petition or file a motion for intervention with the court having jurisdiction over the custody * * * of that child, or if no such proceedings are pending, may petition the court * * * for an order providing for relief under subsection (3) of this section.
>
> "(2)(a) In any proceeding under this section, there is a presumption that the legal parent acts in the best interest of the child.
>
> " * * * * *
>
> "(3)(a) If the court determines that a child-parent relationship exists and if the court determines that the presumption described in subsection (2)(a) of this section has been rebutted by a preponderance of the evidence, the court shall grant custody * * * to the person having the child-parent relationship, if to do so is in the best interest of the child. * * *

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7 *Former* ORS 19.119 (8) (a) (2001), *renumbered* as ORS 109.119 (10) (a) (2003), defines the term "child-parent relationship." Here, the trial court found, and father does not dispute, that grandparents established a "child-parent relationship" within the meaning of the statute. Accordingly, we do not discuss further that aspect of ORS 109.119.

"* * * * *

"(4)(b) In deciding whether the presumption described in subsection (2)(a) of this section has been rebutted and whether to award custody, guardianship or other rights over the objection of the legal parent, the court may consider factors including, but not limited to, the following, which may be shown by the evidence:

"(A) The legal parent is unwilling or unable to care adequately for the child;

"(B) The petitioner or intervenor is or recently has been the child's primary caretaker;

"(C) Circumstances detrimental to the child exist if relief is denied;

"(D) The legal parent has fostered, encouraged or consented to the relationship between the child and the petitioner or intervenor; or

"(E) The legal parent has unreasonably denied or limited contact between the child and the petitioner or intervenor."

"* * * * *

"(8) As used in this section:

"* * * * *

"(b) 'Circumstances detrimental to the child' includes but is not limited to circumstances that may cause psychological, emotional or physical harm to a child."

Although, as this case demonstrates, application of

ORS 109.119 to specific circumstances may involve difficult and close determinations and the exercise of Solomonic judgment by the finder of fact, the statute establishes a clear roadmap for that decision making process. As noted, only persons who have demonstrated a child-parent relationship with the child have the right to seek custody under ORS 109.119. ORS 109.119(1). In such a custody proceeding, the legal parent is presumed to act in the best interest of the child. ORS 109.119(2)(a). That presumption can be rebutted, however, by a preponderance of the evidence, and the statute identifies five nonexclusive factors that the court may consider in determining whether the presumption has been rebutted (rebuttal factors). ORS 109.119(3), (4)(b). Finally, the statute provides that, if the evidence rebuts the presumption in favor of the legal parent, the court shall award custody to the person having the child-parent relationship with the child, but only if to do so is in the best interests of the child. ORS 109.119(3)(a).

D. *The Parties' Contentions Regarding ORS 109.119*

The parties agree that ORS 109.119 (2001) is facially constitutional.[8] They disagree, however, over the interpretation of the statute and its application to this case. Grandparents contend that the evidence at trial supported each of the five nonexclusive factors of ORS 109.119(4)(b) that the court may consider in determining whether the evidence has rebutted the presumption. Grandparents argue first that undisputed evidence supports the factors set out in ORS 109.119(4)(b)(B) and (D) because grandparents had been the children's "primary caregivers" in the months after

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8 It follows that there is no issue before us respecting the constitutionality of ORS 109.119 (2001), and we express no opinion concerning that issue.

mother's death, and father had "fostered, encouraged or consented to" the relationship between grandparents and the children. Second, grandparents assert that the evidence supported a finding under ORS 109.119(4)(b)(E) that father had "unreasonably denied or limited contact" between the children and grandparents by moving the children to Montana without notice to grandparents and in violation of a court order. Finally, grandparents argue that father is "unwilling or unable to care adequately" for the children and that "circumstances detrimental to the child[ren] [would] exist" if the court awarded custody to father, ORS 109.119(4)(b)(A) and (C), based on findings by the trial court as to, among other things, father's job and home instability, past substance abuse, difficulty in controlling his anger, and dishonesty.

Father responds that the evidence at trial was not sufficient to rebut the presumption that he acts in the best interest of the children. Father then makes a multifaceted legal argument, the primary thrust of which is that the court should interpret ORS 109.119 to permit rebuttal of the parental presumption only by a showing that "the parent is *unable* to adequately care for the child or that custodial placement with the parent *will harm* the child." (Emphasis added.) If that interpretation is not required by the words and legislative history of ORS 109.119, father concludes, *Troxel* nevertheless compels such a reading for the statute to be consistent with the Due Process Clause. Put another way, father argues that if ORS 109.119, as applied to the facts here, results in the award of custody to grandparents, then that award would infringe his rights under the Due Process Clause because grandparents have not shown that father is unable or unwilling to care for the children or that awarding custody to father will harm the children.

E. *Construction of ORS 109.119*

Before we can evaluate the parties' competing positions, we first must construe ORS 109.119. We then can consider the facts in this proceeding in light of that construction.

The 2001 amendments to ORS 109.119 were intended to make that statute consistent with the due process requirements articulated in *Troxel*, but not to make broader changes in custody law.[9] Nothing in the text of the 2001 amendments or in the legislative history indicates that the legislature intended to make any change to the custody standard other than the protection of the parental right recognized in *Troxel*. Thus, as we examine ORS 109.119, we do so in view of the legislature's intent to meet the constitutional mandate of *Troxel* which, as we discussed above, requires a court, in making custody or visitation

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9 Representative Lane Shetterly, who sponsored the legislation, stated the drafters' intentions before the House Judiciary Committee:

"What I would emphasize to the committee is that my charge to the work group, which I think they maintained very well, was that *our focus would be limited to addressing those issues raised by the Troxel case*. That is, we already had third-party visitation and custody in the Oregon statutes, uh, the *Troxel* case raised issues as to constitutionality under its analysis of the Washington statute. And so the charge to the work group which I think they held to very well, and so did the subcommittee, was that we would only deal with those issues raised by the *Troxel* case, and try not to get into re-debating the fundamental issues of third-party visitation, or trying to make changes in those statutes that went beyond the *** issues raised by the *Troxel* case. *I would invite anyone to bring another bill to raise those broader issues, but this is one of these things we need to do, and so to get it done, we kept a very narrow focus.*"

Tape Recording, House Committee on Judiciary Work Session, Mar 30, 2001, Tape 30, Side A (emphasis added).

decisions, to accord some special weight to a parent's determination of what is in the child's best interest. ORS 109.119(2)(a) purports to implement that mandate by establishing "a presumption that the legal parent acts in the best interest of the child." However, as discussed above and as permitted by *Troxel*, that presumption can be rebutted. ORS 109.119(3)(a) provides that, "if the court determines that the presumption * * * has been rebutted by a preponderance of the evidence, the court shall grant custody * * * to the person having the child-parent relationship, if to do so is in the best interest of the child."

The difficult issue in construing this statute is to determine how demanding the burden is on the nonparent to rebut the parental presumption. As noted, father's argument suggests that the nonparent's burden is a "heavy" one that can be met only by showing that a parent is unable to care for the child or will harm the child. Grandparents do not articulate any specific standard, other than to repeat the words of the statute, but suggest that the parental presumption "easily" can be rebutted by evidence of any one of the five nonexclusive factors listed in ORS 109.119(4)(b).

Such characterizations of the evidence to rebut the parental presumption are of limited utility. Rather than place any further adjectival gloss on the burden that an otherwise qualified nonparent must meet, we offer the following observations respecting the operation of the statute, in the hope that they will assist courts in applying the statute in future cases. First, the legislature used the basic "preponderance of the evidence" standard for cases such as this, involving a custody petition by a nonparent who has a parent-child relationship with the child, while imposing the more demanding "clear and convincing evidence" standard when a person with an "ongoing personal relationship" seeks

to overcome the parental presumption and obtain visitation or other rights regarding a child. ORS 109.119(3)(b).

Second, as previously discussed, the legislature specifically identified five factors that may be considered in determining whether the presumption has been rebutted. ORS 109.119(4)(b). By stating that those factors are nonexclusive and by including, as relevant factors, whether the nonparent recently has been the child's primary caretaker and whether the legal parent has consented to the relationship between the child and the nonparent, the legislature demonstrated that the parental presumption can be rebutted *without* a showing that the parent will harm the child or is unable to care for the child.

Third, the legislature could have imposed a more rigorous standard than the standard that we have read *Troxel* to require. However, as discussed above, the legislature declined to do so. That fact further supports the conclusion that the presumption can be overcome without showing that a parent is unable to care for the child or will harm the child. *Troxel* holds only that the Due Process Clause requires that "some special weight" be given to the interest of the legal parent, and nothing in the amendments to ORS 109.119 suggests that the legislature intended its use of the rebuttable parental presumption to impose a higher standard.

Finally, as previously discussed, we note that the consequences of a custody decision are less drastic, and the statutory requirements for such a decision correspondingly less exacting, than when the state petitions to terminate a parent's rights because the parent is "unfit" or to have a child determined to be within the jurisdiction of the juvenile court because the parent has failed to provide necessary care.

Accordingly, although we recognize the significance

of the parental interest protected by the presumption embodied in ORS 109.119(2)(a), we nevertheless take the legislature at its word (as we must) when it determined that the presumption could be overcome by a showing, based on the preponderance of the evidence, that a parent does not act in the best interest of the child, and left to the courts as triers of fact the task of deciding whether the nonparents had made that showing in any particular case.

We therefore turn to the other critical issue of statutory construction in this case, namely, what evidence must a nonparent seeking custody present to show that the legal parent does not act in the best interest of the child. We will discuss each of the five rebuttal factors listed in the statute when we review the evidence in this case. But we first must resolve the issue of whether evidence that supports less than all those factors -- or other evidence not encompassed within the enumerated factors -- is sufficient to rebut the statutory presumption.

Grandparents point out that the statute phrases the five rebuttal factors in the disjunctive, rather than the conjunctive. That phrasing suggests that, in an appropriate case, a court could conclude that the presumption was rebutted based on evidence of the existence of only one factor, provided that the court found, by a preponderance of the evidence, that the nonparent had overcome the presumption that the legal parent acts in the best interest of the child. There may be cases in which the parent is so obviously unwilling or unable to care adequately for the child that a court could conclude that the parental presumption was rebutted, despite the absence of evidence of any of the other four factors. Conversely, a nonparent may be able to present some evidence of each of the five enumerated factors and yet be unable to prove, by a preponderance of the evidence, that

the legal parent fails to act in the best interest of the child. In specific cases, the weight to be given to each of the five statutory factors, to the evidence supporting those factors, and to other relevant evidence, will vary. The statutory touchstone is whether the evidence at trial overcomes the presumption that a legal parent acts in the best interest of the child, not whether the evidence supports one, two, or all five of the nonexclusive factors identified in ORS 109.119(4)(b).

This court has taken the approach set out above in construing other statutes in which the legislature has provided a nonexclusive list of factors for a court to consider in making a determination under the statute. In *Stillman*, for example, this court interpreted and applied ORS 419B.504, which describes the standard for determining when parental rights may be terminated because of parental unfitness. The statutory standard was whether the parent was "unfit by reason of conduct or condition seriously detrimental to the child," and the statute provided that, in making that determination, the court was to consider six nonexclusive factors, including the parent's "emotional illness," "physical neglect of the child," and "criminal conduct that impairs the parent's ability to provide adequate care of the child." 333 Or at 144-45 (quoting ORS 419B.504). In construing that statute, this court stated:

> "[T]he legislature has provided a nonexclusive list of six examples of conduct and conditions that courts must consider, both in determining whether a parent is unfit and in determining whether the parent's disqualifying circumstances are not likely to change. But those statutory examples are just that -- examples. The focus of that part of the statute is on the parent's conduct or condition."

333 Or at 146. Similarly, the focus of the statute here

is not on whether one or more of the statutory factors are present, but on whether the evidence as a whole is sufficient to overcome the presumption that the parent acts in the best interest of the child. [10]

Father is probably correct that, ordinarily, a nonparent seeking to overcome the parental presumption will do so by proving that the parent is unable or unwilling to provide adequate care or that the parent is likely to cause harm to the child. However, nothing in the text of ORS 109.119 or in *Troxel* suggests that such proof is required for the nonparent to rebut the presumption that the parent acts in the best interest of the child.

IV. APPLICATION OF ORS 109.119

We now consider the evidence in this case in light of our construction of the controlling statute. As noted, no party has argued to this court that grandparents have not established a "child-parent relationship," as defined in ORS 109.119(8)(a) (2001), with each child. The trial court found that they had established such relationships, and the Court of Appeals did not disagree. Accordingly, grandparents may seek custody of the children under ORS 109.119. Neither does any party argue that father is not a "legal parent" entitled to the presumption set out in ORS 109.119(2)(a) that

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10 *See also State ex rel Juv. Dept v. Smith*, 316 Or 646, 652-53, 853 P 2nd 282 (1993) ("We therefore reject the proposition that any specific condition or circumstance *per se* does, or does not, establish the juvenile court's jurisdiction. We read ORS 419.476 (1) (c) to require the juvenile court to consider *the totality of the circumstances* presented in the case before it. If, *after considering all the facts*, the juvenile court finds that there is a reasonable likelihood of harm to the welfare of the child, the court may take jurisdiction.") (emphasis added).

he acts in the best interests of the children.[11] The parties disagree, however, as to whether the evidence at trial was sufficient to rebut that statutory presumption.

A. *Findings as to the Rebuttal Factors*

The first rebuttal factor is whether the "legal parent is unwilling or unable to care adequately for the child." ORS 109.119(4)(b)(A). It should be obvious that, if a nonparent proves by a preponderance of the evidence that a parent is "unwilling" or "unable" to care for the child, the nonparent will have rebutted the presumption that the parent acts in the best interest of the child. However, consideration of this factor does not allow the court to substitute its judgment for that of a parent by determining that the nonparent is *better* able to care for the child. The legislature's use of the word "adequate" suggests that the parent must have the willingness and ability to provide something more than a bare subsistence level of care for the child, but that it would be inappropriate to compare a parent's "adequate" care with a nonparent's "more than adequate" care in considering this factor.

Here, grandparents assert that the evidence described above demonstrates that father is "unwilling or unable to care adequately" for the children. ORS 109.119(4)(b)(A). We disagree. Although grandparents claim that father's job and residential instability and other personal issues show father's

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11 We use the term "legal parent" because that is the term used in ORS 109.119 (2) (a). That term includes, generally, biological and adoptive parents. See ORS 109.119 (8) (e) (2001) ("legal parent" means parent as defined in ORS 419A.004 whose parental rights have not been terminated); ORS 419A.004(16) (defining "parent" as biological or adoptive mother of child and adoptive or "legal" father of child, and identifying circumstances in which biological father is "legal" father).

shortcomings as a parent, those facts do not demonstrate that father is "unwilling" or "unable" to care adequately for the children as those terms are used in the statute. On the contrary, father plainly is willing to care for the children, and the evidence at trial, including the report and testimony of the court-appointed psychologist, Dr. Vien, does not support grandparents' assertion that father is "unable" to provide "adequate" care.

Grandparents' argument that the "adequate care" factor favors their claim for custody boils down to the assertion that they are *better* able to care for the children than father is and that they will provide "better than adequate" care. Whether or not that claim is true, as to the rebuttal factor identified in ORS 109.119(4)(b)(A), only evidence that father is "unwilling or unable to care adequately" for the child is relevant in the process of determining whether grandparents have rebutted the presumption of parental fitness. *See also Troxel*, 530 US at 72-73 ("[T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a judge believes a 'better' decision could be made."). We find that grandparents have not shown that father is "unwilling or unable to care adequately" for the children.

We next consider whether grandparents have shown that they "[are] or recently [have] been the child[ren]'s primary caretaker[s]." ORS 109.119(4)(b)(B). This factor focuses on the interest in continuity of caregiving and the relationship between the child and the nonparent seeking custody. As noted, grandparents had an unusually close and positive relationship with the children for many years, and mother and children (and, at times, father) lived with grandparents on occasion. After mother's death in March

1999, grandparents were the children's primary caretakers for more than three months. We find that grandparents have shown that they are or recently have been the children's primary caretakers.

The third factor identified in the statute is whether "circumstances detrimental to the child exist" if the relief sought by the nonparent is denied. ORS 109.119(4)(b)(C). In contrast to terms used in the other rebuttal factors, "circumstances detrimental to the child" is defined in the statute. ORS 109.119(8)(b) (2001). That definition states that the phrase includes, but is not limited to, "circumstances that may cause psychological, emotional or physical harm to a child." Because the circumstances of living with father *may* cause such harm, grandparents assert, the evidence supports that rebuttal factor.

Father responds that this factor requires grandparents to show that the circumstances, if he retains custody of the children, would be *presently* detrimental to the children. He further argues that, if "detrimental circumstances" is defined in an open-ended way to include circumstances that *may* cause psychological, physical, or emotional harm to a child at some *future* time, that interpretation would reduce the showing required to rebut the parental presumption to a level that would be inconsistent with *Troxel* and essentially would reinstate a "best interest of the child" standard.

Father is correct that the statutory rebuttal factor of whether "[c]ircumstances detrimental to the child exist if relief is denied," ORS 109.119(4)(b)(C), by using the present tense of the verb "exist," focuses on whether *present* circumstances cause *present* detriment to the child. In comparison, the definition of that phrase in ORS 109.119(8)(b) (2001) appears to broaden the permissible inquiry to include circumstances that "may" in the future

cause harm to the child. It also is true that, although the vast majority of parents seek to avoid physical harm to their children, life in almost any family includes circumstances that "*may* cause psychological [or] emotional * * * harm." ORS 109.119(8)(b) (2001) (emphasis added). Our task, of course, is to interpret the statute as the legislature intended, and we look first to the words that the legislature used. Examining those words, we conclude that "circumstances detrimental to the child," as used in ORS 109.119(4)(b)(C), refers to circumstances that pose a serious present risk of psychological, emotional, or physical harm to a child. We reach that conclusion because the purpose of that rebuttal factor, within the context of ORS 109.119, is to aid the finder of fact in determining whether a nonparent has overcome the presumption that the legal parent acts in the best interest of the child. That presumption would be almost meaningless if it could be overcome by evidence that the circumstances of living with a legal parent "*may* cause psychological, emotional, or physical harm to a child." Based on the text and structure of the statute, we conclude that the legislature intended that, to rebut the statutory presumption that the legal parent acts in the best interests of the child by showing that "circumstances detrimental to the child exist if relief is denied," the nonparent must demonstrate that the circumstances of living with the legal parent pose a serious present risk of psychological, emotional, or physical harm to the child.

In support of this factor, grandparents again point to evidence of father's substance abuse and anger control problems and his relationship with Oliver, who also has substance abuse and anger problems and who lost custody of two of her own three children. They emphasize the trial court's finding that father has limited insight, lies whenever it suits him, is insensitive to the children's emotional needs,

and would end the children's longstanding child-parent relationship with grandparents. They further argue that father leads an unstable life, with frequent changes of jobs and residences. They note that, during the approximately nine months that children lived with father during 1999 and 2000, the family lived at four different addresses and that, as a result, Taryn attended three different schools during his first year of elementary school. For those reasons, grandparents argue, "circumstances detrimental to the child[ren]" would exist if grandparents are denied custody.

Applying the standard that we articulated above, we find that grandparents have shown, by a preponderance of the evidence, that awarding custody to father would pose a serious present risk of psychological or emotional harm to the children. Based on the testimony of Dr. Vien and others, we find that father's lack of understanding of the children's emotional and developmental needs, his difficulty in controlling his own anger, and his lack of insight, considered together, pose a serious risk of psychological or emotional harm to the children. Father fails to recognize the emotional attachment that the children have to grandparents and other relatives of mother or the impact on the children of the family's changes of residence. Father was unable to acknowledge or identify a single possible shortcoming that he might have as a parent. Father similarly could identify no potential weakness that Oliver might have as a caregiver for the children, despite acknowledging her earlier marijuana and methamphetamine use, anger control problems, loss of custody of two of her own children, and failure to complete a drug rehabilitation program. Dr. Vien stated that father likely would be "overwhelmed by the demands of single parenthood" and would need to rely on Oliver as a significant caregiver for the children. We find that Oliver's deficiencies as a caregiver, and father's complete failure to acknowledge

any of them, both indicate a serious risk to the well-being of the children if father were granted custody.

As to grandparents' assertions that father's frequent changes of jobs and addresses demonstrate "circumstances detrimental" to the children, our conclusions require some elaboration. In our view, the fact that a parent changes jobs or addresses frequently does not demonstrate "circumstances detrimental to the child" that are sufficient to rebut the presumption in favor of the parent. Although, other things being equal, frequent changes of school and residence are not ideal for children, such changes are a fact of life for many families. A parent who serves in the military, works for a large corporation, or labors in the fields may be required to move often. Such moves do not necessarily indicate that the parent fails to act in the best interests of the children. [12] In this case, however, the evidence is different. Although some of father's testimony was contradictory, it is apparent that most of his changes of jobs and residences, as reflected in this record, were not required by financial, employment, or other external circumstances. Rather, the evidence shows that father's moves were choices that he made independent of the necessities of life as described above but, instead, usually because he wanted to leave behind problems or conflicts with other people. The trial court found, for example, that father's testimony that he moved to Montana for a "fresh start" showed a "lack of insight into how to constructively deal with problems." Moreover, father's moves during the time

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12 This court made a similar point in refusing to terminate parental rights in *State v. McMaster*, 259 Or 291, 486 P 2nd 567 (1971). Despite finding that the family situation had some characteristics that also are present here (although to a lesser degree), including "transiency" and "instability," this court stated that parental rights could be terminated only by showing "a more serious and uncommon detriment" than was caused by the parents' conduct there. *Id.* At 303

that he had custody of the children often were abrupt and undertaken with minimal planning or consideration of the interests of the children. Accordingly, although we emphasize that a parent's frequent changes of jobs and residences, by themselves, do not tend to show "circumstances detrimental to a child," when, as here, the parent chooses to move often not because of employment or other external considerations but simply because of a desire to move, and the parent fails to consider the impact of the moves on the child, those moves can be relevant to the determination whether the parent fails to act in the best interest of the child.

Having reviewed the entire record, we find that circumstances detrimental to the children would exist if custody is granted to father.

The next rebuttal factor is whether the "legal parent has fostered, encouraged or consented to the relationship between the child and the [nonparent]." ORS 109.119(4)(b)(D). This factor recognizes that if a parent encouraged or approved of a longstanding pattern of contact or informal custody arrangements involving a grandparent or psychological parent, then the legal parent, at least at one point, apparently believed that relationship was beneficial, or at least not detrimental, to the child.

Here, it is undisputed that father consented to the development over many years of a close relationship between grandparents and the children and that he agreed that children should live with grandparents in the immediate aftermath of mother's death. Father argues, however, that it would be unfair to him to permit his consent to allowing the children to live with grandparents during that time to be used to rebut the parental presumption. After all, father points out, he consented because he understood that he was not prepared

on short notice to take custody of the children, and his consent properly could be seen as an action taken in the best interests of the children. At this point in the statutory analysis, however, we do not consider father's motives or intentions in consenting to the relationship between grandparents and the children, but only whether he, as the legal parent, encouraged or consented to it. We find that he did. As we discuss later, however, we agree with father that this factor should not be accorded any weight in rebutting the parental presumption in this case, because the fact that father consented to grandparents serving as primary caregivers and otherwise having a close relationship with the children does not indicate in any way that he does not act in the best interests of the children.

The final rebuttal factor listed in the statute is whether the "legal parent has unreasonably denied or limited contact between the child and the [nonparent]." ORS 109.119(4)(b)(E). Like the factor just discussed, this factor focuses on the relationship between the child and a nonparent and, specifically, on the potential harm to a child's interest when a parent terminates or limits such a relationship. Grandparents argue that father "unreasonably denied or limited contact" between the children and grandparents, ORS 109.119(4)(b)(E), by moving the children with him and Oliver to Montana, in violation of a court order. The trial court, based on that action and the court's assessment of father's credibility in light of his trial testimony, stated, "Father's conduct convinces me that he will remove the children from this area if possible and will do all he can to eliminate contact between the children and the Grandparents." We agree.

Father argues that it is unfair to penalize him for limiting grandparents' contact with the children when

grandparents also took steps to limit *his* contact with the children. He points out that, after the children spent two weeks with grandparents in July 1999, with father's consent, grandparents did not return the children to father. Instead, grandparents sought a court order *ex parte* contending that the children should remain with them. As noted previously, they obtained a court order, but it was vacated soon thereafter and the children were returned to father. Although father suggests that his conduct in taking the children to Montana was no different than grandparents' conduct in failing to return the children after the two-week visit and seeking a custody order, he is mistaken. Father left for Montana in violation of a court order, in breach of his promise to the trial judge, and without notice to grandparents or the court. Once in Montana, father refused to disclose his location and did not return the children until the court found him in contempt of court. We find that father unreasonably denied or limited contact between the children and grandparents.

B. *Determination Whether Presumption Has Been Rebutted*

To summarize the discussion above, grandparents have shown that some, but not all, of the rebuttal factors are present in this case. We now consider whether the evidence here is sufficient to rebut the presumption that father acts in the best interests of the children. As we discussed above, our focus is not on specific factors but on whether, based on the totality of the circumstances, grandparents have rebutted the presumption that father acts in the best interests of the children.

In this case, we have found facts that support four of the factors, and we place particular emphasis on three of them: grandparents' role as primary caretakers to the children after mother's death; father's denial of contact between the children and grandparents by moving the children to

Montana; and the risk to the children that granting custody to father will be detrimental to them.[13] ORS 109.119(4)(b)(B), (C), (E). First, grandparents were closely involved in the lives of the children for many years and stepped into the role of primary caretakers immediately upon mother's death; grandparents did not simply show up for the first time seeking custody after mother's death. Second, father's removal of the children to Montana not only prevented contact between grandparents and the children, but also violated a court order and father's in-court promise to a judge. Moreover, it significantly disrupted the children's lives, as discussed above. Finally, and most importantly, as to whether awarding custody to father would be "detrimental" to the children, we conclude that the evidence demonstrates that such an award would pose a serious present risk of psychological or emotional harm to the children. The statute requires us to examine whether the evidence in support of each identified factor (and any other evidence relevant to rebutting the presumption), when taken as a whole, rebuts the presumption. ORS 109.119(3)(a). Considering all the evidence, we conclude, on *de novo* review, that grandparents have rebutted, by a preponderance of the evidence, the presumption that father acts in the best interests of the children.

C. *Consideration of Whether Awarding Custody to Grandparents is in Best Interests of the Children*

Based on our finding that grandparents have rebutted the parental presumption, the statute provides that we "shall

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13 Although we have found that father consented to grandparents' role as primary caregivers after mother's death, for the reasons discussed previously, 337 Or at 115-16, we conclude that, in this case, that fact is not evidence that rebuts the presumption that father acts in the best interests of the children.

grant custody" to grandparents "if to do so is in the best interest of the child[ren]." ORS 109.119(3)(a). Making that determination is a separate statutory inquiry from whether the presumption that the parent acts in the best interest of the child has been rebutted under ORS 109.119(4)(b). Here, however, we have explored the evidence in the record thoroughly in our discussion above, and it would serve no purpose to review that evidence again. It is sufficient to state that we conclude, based on the evidence in the record, that granting custody to grandparents is in the children's best interests.

V. FATHER'S CONSTITUTIONAL ARGUMENTS

Our conclusion that granting custody to grandparents is in the children's best interests does not end our inquiry, however, because father argues that, applied in this manner, ORS 109.119 violates his state and federal constitutional rights. We begin with father's state constitutional argument.

A. *Father's State Constitutional Argument*

Although father does not argue that ORS 109.119 is facially unconstitutional, he does assert that, if the statute is applied so as to deny him custody here, then that application of the statute would violate the "remedy clause" of Article I, section 10, of the Oregon Constitution, which provides that "every man shall have remedy by due course of law for injury done him in his person, property, or reputation." [14] In reaching that conclusion, father relies upon cases in which

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14 Article I, section 10, provides:

"No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation."

this court has held that the remedy clause prohibits the state from eliminating a common-law cause of action for injury to a right protected by Article I, section 10, unless the state provides a constitutionally adequate substitute. However, father's advocacy falls far short of demonstrating how any "remedy," as that term is used in Article I, section 10, is implicated at all by the legislative choice embodied in ORS 109.119. We therefore do not address the subject further.

B. *Father's Federal Constitutional Argument*

We now turn to father's federal constitutional argument. As we noted at the outset, father does not argue that ORS 109.199 is unconstitutional on its face. He does claim, however, that the statute is unconstitutional in its application unless the evidence introduced to rebut the statutory presumption that a parent acts in the best interests of the child demonstrates that the legal parent is *unable* to care adequately for the child or that custodial placement with the legal parent will *harm* the child. That is so, father argues, because *Troxel* holds that the Due Process Clause requires that "at least some special weight" be given to a fit parent's determination of what is in the child's best interest. 530 US at 70. Father asserts that, if the statute allows the constitutional "presumption that fit parents act in the best interests of their children," *id.* at 68, to be rebutted by evidence short of demonstrating either present harm to the child or the parent's inability to care for the child, then that application of the statute violates the parent's due process rights.

Father certainly is correct that ORS 109.119, as we have interpreted it above, permits the presumption that the legal parent acts in the best interest of the child to be rebutted by evidence that does not rise to the level of showing that the legal parent is *unable* to care for the child or that granting custody to the legal parent *will cause harm* to the child. That

is the state of the evidence in this case. Father is wrong, however, in arguing that *Troxel* requires some showing beyond that made by grandparents in this case.

As our earlier discussion of *Troxel* demonstrates, that case does not sweep as broadly as father asserts. *Troxel* specifically declined to address the so-called "harm" standard, and it also failed to articulate an "inadequate care" requirement. Rather, the due process right that the Supreme Court affirmed in *Troxel* is important, but limited: a court may not override a parent's decision about the care or custody of a child simply because the court determines that the decision is not in the child's best interest, as the trial court did in *Troxel* regarding a grandparent's interest in visitation. Instead, the court must presume that a fit parent's decision is in the best interest of the child, and the court may reach a decision contrary to the wishes of the parent only if there is evidence sufficient to overcome that presumption. *Troxel* goes no further.

Troxel does require the state to give "some special weight" to the interest of a parent in decisions regarding a child. ORS 109.119, as we have interpreted and applied it here, responds to that mandate and appropriately protects father's due process rights. In our factual findings and legal conclusions, we have followed the statute and presumed that father acts in the best interests of the children. We have considered a petition by grandparents who have the status, under the statute, of psychological parents. We have examined factors reasonably identified by the legislature as relevant to making a custody decision, and we have concluded, by a preponderance of the evidence, that the evidence in support of those factors overcomes the presumption that father will act in the best interests of the children. Father received the deference to his due process

rights that *Troxel* requires. For the foregoing reasons, we award custody of the children to grandparents, with parenting time, as determined by the trial court, to father.

Finally, we pause to recognize the limitations of the appellate process in dealing with cases of this kind. As we noted at the outset, we have reviewed the record *de novo* and also have determined (with the parties' agreement) not to remand to the trial court for additional development of the record. We have done so, in large part, because of the need for finality in this case. That important consideration, however, carries with it the consequence that we have reviewed a record that now is three years old. The children certainly have changed during that time, and the lives of father and grandparents also may have changed in ways that, if part of the record, would cause us to view some of the issues in this case differently than we have. But that unfortunate temporal handicap of appellate decision making does not diminish the need for a final resolution to these proceedings, which this disposition provides.

The decision of the Court of Appeals is reversed, and the judgment of the circuit court is affirmed.

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF WASHINGTON

In the Matter of the Marriage of:

RAYNE ELIZABETH O'DONNELL-LAMONT (deceased)	) Case No. C98-1284 DR
Petitioner, and	)
MICHAEL DAVID LAMONT, JR.	) JUDGMENT RE CUSTODY, PARENTING TIME AND THIRD-PARTY VISITATION
Respondent and	)
CHRISTINE AND PATRICK O'DONNELL,	)
Intervenors, and	)
DARRELL MILLER,	)
Intervenor.	)

THIS MATTER came before the Honorable Steven L. Price for trial on April 28 and May 4, 5, 10, 11, and 18, 2000. Michael Lamont ("Father") was represented by Matthew H. Kehoe of MOORE & KEHOE, LLP. Darrell Miller was represented by Jeffrey Renshaw of YATES, MATTHEWS & MORASCH, P.C. Christine and Patrick O'Donnell ("Grandparents") were represented by Kimberly A. Quach of

GEVURTZ, MENASHE, LARSON & HOWE, P.C. The Court heard the testimony of Father, Grandparents, Tea Engstrom, Kathy Harris, Matt Lyle, Debbie Marinello, Greg McKenzie, Darrell Miller, Martha Miller, Katie O'Donnell, Craig Schreiter, Eugene Sweet, Wende Thomas, Dr. Edward Vien, Psy. D., Dan Wentworth, Sue Woodson, and Ms. Zicker, the Court also having considered the parties' trial memoranda, Grandparents' Supplemental Memorandum re Constitutionality of ORS 109.119, and the exhibits admitted during trial; therefore, the court makes the following findings of facts and judgment:

I. FINDINGS OF FACT

1. The courts of the state of Oregon have exclusive jurisdiction to make child custody determination in this matter under the provisions of the Uniform Child Custody Jurisdiction & Enforcement Act, codified at ORS 109.701 et seq., and the Parental Kidnaping Protection Act, codified at 28 USC §1738A, because Oregon is the children's undisputed home state;
2. Father was served with a true copy of Grandparents' Motion to Intervene by Psychological Parent to Establish Custody under ORS 109.119(1) or to establish Guardianship or both on July 30, 1999;
3. The children at issue in this case are Taryn Lamont (dob 09/19/92) and Seaira O'Donnell-Lamont (dob 1/29/96);
4. Father and Mother were married in December 1991. Mother and Father separated intermittently during the marriage. Even when together, Mother was the primary, nurturing

parent. When the parents were separated, Mother remained the primary parent;

5. During the marriage (and even after the parents' divorce), Grandparents and Mother and the children (and sometimes Father) made it a point of living close by each other. Mother relied heavily on Grandparents and other family for childcare and emotional and, at times, financial support.

6. Father was less involved than Grandparents in the children's lives before Mother's death. During the marriage, Father sometimes lived out of the family home. During the separation, he lived out of the immediate area and had frequent, but not regular, parenting time with the children;

7. Father abused Mother during the marriage. Twice during the parties' last separation, he violated the FAPA restraining order she secured in a manner that was alarming or threatened violence. Twice in the three (3) months before Mother's death, Father was involved in drunken physical altercations;

8. Throughout the marriage, Father went through many jobs. Although he was always capable of obtaining a decent paying job, he was not capable of keeping one. He was fired from at least one job for dishonesty;

9. During the marriage, Father abused some illegal substances, was unstable in employment, and was dishonest. Although he claims things have changed, his is not convincing;

10. On March 20, 1998, Father abused Mother to the point justifying entry of a Family Abuse Prevention Act Order that Father did not

contest. The FAPA Order allowed only supervised parenting time between the children and Father;

11. In spite of the FAPA Order, Father, Mother and the children took a trip to Hawaii as a family in July 1998. Grandfather drove them to and from the airport;

12. Father and Mother signed a Stipulated Judgment of Dissolution of Marriage in early August 1998 that became effective in September 1998. The Stipulated Judgment required that Father share only supervised parenting time with the children;

13. In addition to the trip to Hawaii, Mother condoned Father's violation of the FAPA Order by initiating prohibited contact, and Mother allowed some unsupervised parenting time in violation of the Stipulated Judgment;

14. Mother used the FAPA Order to control Father. She enforced the provisions when it suited her purpose, not otherwise;

15. In late 1998, Mother met Portland police officer Darrell Miller. Beginning in December 1998, Mr. Miller was off work with an injury and spent most days and nights at Mother's apartment, where he also spent time with the children. He grew quite fond of them and they of him;

16. In March 1999, Mr. Miller, Mother and the children traveled to southern California to visit friends and Disneyland. While on this trip, Mother (who was 27 at the time) collapsed suddenly from a heart problem and never revived. The children were not present during her passing. Mr. Miller then returned with

children to Oregon. Grandparents and Father met them at the airport. The day after their arrival, the adults told the children that their Mother had passed on;

17. At the time of Mother's passing, Father was working in Eugene. He worked (and continues to work) in construction making a decent income. At the time of Mother's passing, he was living in a trailer not suited to a family. He and Grandparents agreed that Grandparents would keep the children. This was a logical thing to do because Grandparents lived close to Mother's and the children's residence and they were very close to the children;

18. Had Father lived in the Portland area at the time of the Mother's passing, he would have been better able to step into the children's lives when Mother died;

19. Father felt overwhelmed at having become the sole surviving parent of the children. This was exacerbated by Grandparents' effort to control Father and the children;

20. Father's family was not much of a resource. They did not live in the area immediate to the children. Mother had fallings out with Father's parents over the years. Father's family was dysfunctional, with physical and substance abuse a common theme. Earlier in the marriage, Mother and Father had lived with paternal grandfather in the Detriot Lake area, which ended with Mother having a falling-out with paternal grandfather;

21. Over the years, Mother would get into a dispute with one or the other of Father's parents and decide to never have anything to do with them

again. She would write homemade "wills" purporting to list the major failings of the paternal grandparents and conditions, if any, under which that person could ever see the children if the parents were to die. Mother would write that her pronouncements were not to be contested. She would then tell Father to sign them, and he would;

22. Mother had a tendency to control others;

23. Grandparents, particularly Grandmother, showed controlling traits at the time of Mother's passing. They did not want Father to have the children, at least beyond their ability to control his custody, and took steps to keep the children. They tended to dote on the children anyway. This, along with the loss of their daughter, put them into high gear for protecting the children upon Mother's passing;

24. Father and Grandparents, at Grandparents' insistence, engaged in mediation regarding the children's future shortly after Mother died. Grandparents pushed to keep the children and Father resisted. Eventually, Father refused to sign a Guardianship agreement that Grandparents' attorney, Greg MacKenzie, prepared;

25. In July 1999, following these efforts, Father took the children and did not return them. He did not tell Grandparents in advance that he was going to do so. Father and Grandparents were not on good terms from this point forward, to put it mildly;

26. Father agreed to let Grandparents have the children for two (2) weeks in late July. Grandparents took the children but did not

return them. Instead, they went to court for an *ex parte* status quo order, alleging that theirs was the status quo residence. The Court granted the status quo order on July 30, 1999.

27. Grandmother is not so much deceptive as naive in testifying that she did not see how Grandparents' conduct, along with the allegations made in support of it, caused hard feelings between Father and Grandparents;

28. On August 17 and 18, 1999, The Honorable Donald R. Letourneau heard Father's challenge to Grandparents' *ex parte* quo order. At the hearing, Father's position was that he would keep the children in the Salem area (he was living in Keizer) indefinitely, and allow Grandparents time with the children. Judge Letourneau's Order After Hearing dated August 29, 1999 returned the children to Father. They have remained with Father primarily through trial;

29. Judge Loutourneau awarded Father $3,000 in attorney fees following the hearing on August 17 and 18, 1999. Grandparents have fully satisfied this obligation;

30. On August 19, 1999, Judge Loutourneau also signed an order required Dr. Edward Vien, Psy. D., to conduct a custody evaluation. The Order did not specify now Dr. Vien's fees were to be divided. The O'Donnell's paid Dr. Vien $4,500. Father would not contribute to Dr. Vien's fee;

31. As of October 1, 2000, Father and his significant other, Laura Oliver, left with the children for Montana. They did so secretly, without notice to the Grandparents. Father

resisted the Grandparents' efforts to locate him and the children;

32. Finally, on October 28 and November 15, 1999, the Honorable Michael J. McElligott found Father in contempt and ordered him to return to Oregon and live within a 60 mile radius of the Washington County Courthouse on or before November 30, 1999, or to return the children to Grandparents. Father complied by moving back within the specified radius;

33. Judge McElligott further ordered that Father pay Grandparents $1,500 in attorney fees. Father has not satisfied any of this obligation;

34. Laura Oliver brought her own set of problems to the relationships with Father and the children. These included untreated anger and substance abuse problems that were partly the cause of her loss of custody of her children from prior relationships;

35. Ms. Oliver has a history of substantial anger and substance abuse problems. The Court is not satisfied that she has overcome her problems. Thus, her influence in the children's lives is likely to make them worse instead of better;

36. After returning from Montana to Oregon, Father, Ms. Oliver and the children lived with paternal grandfather and step grandmother. Father and Ms. Oliver, who were engaged at the time of trial, had been seriously involved with each other for 18 months or less at the time of trial. They purchased a house together in Mill City, Oregon. The children lived with them at the time of trial;

37. At first, the Court was skeptical of Dr. Vien's

observations and conclusions because the Court assumed the Father was the appropriate custodian of the children. By the end of trial, the Court was in virtual complete agreement with Dr. Vien;

38. Dr. Vien noted that, while not fragile, the children have grief issue to address and emotional needs to be met. Father by history and inclination will not adequately address those issues;

39. The violence and substance abuse of Father's family, while perhaps dormant, is a potential threat to the children;

40. Father has the potential to be a good custodial parent. Father meets the minimum standards of fit parenthood. He has had many shortcomings and has not satisfied the Court that these shortcoming have been corrected. However, he loves the children and has the ability to correct his deficiencies as a parent;

41. Father loves his children. He has attempted to provide for them. He is commended for that. Many parents do not try. However, he was never the primary, nurturing parent. He has been abusive to Mother and has difficulty controlling his anger. His children have picked up on his anger toward Grandparents. He has a history of substance abuse. He has too rapidly secured an unproven partner, with many similar issues, in an effort to set up a home for the children. The Court cannot accept his word that the situation is a good as he would like the Court to believe, or perhaps as he has led himself to believe. His life is unstable, including many job changes;

42. All of the dangers that Father presented to the children at Mother's death are still there. These circumstances present sufficient threat of harm to the children to defeat whatever supervening right Father many have as a biological parent. Although Father is not so unfit as to justify termination of his parental rights, he is sufficiently dangerous to their welfare to justify limitation of his parental rights;

43. Within six (6) months of filing their Motion to Intervene - from about March 27, 1999 to on or about July 7, 1999 - the Grandparents had physical custody of the children in Grandparents' home. Mother had just died. Father was living near Eugene as a single adult and chose to have Grandparents provide the primary physical and emotional care of the children. The children were emotionally distraught due to the recent and unexpected death of Mother, who had been their primary parent during the parents' separation and divorce;

44. On a daily basis, Grandparents provided the children with food, clothing, shelter and incidental necessaries as well as care, education and discipline. This was accomplished through interaction, companionship, interplay and mutuality that fulfilled the children's physical and psychological need for a parent. At the children's most vulnerable hour, Grandparents took them in, fed them, loved them, and guided them. Because of the years of close contact between Grandparents and the children, it was natural for Grandparents to do this and for the children to look to them for this parenting;

45. This was not a case where distant Grandparents came from another region of the country to step into the breach brought on by the unexpected death of their daughter. These Grandparents were geographically and emotionally close to the children throughout their lives;

46. Grandparents are psychological parents within the meaning of ORS 109.119 (6) (a);

47. The children are bonded to Father and Grandparents. The bond is strong to all three (3). The bond is slightly stronger to Father. However, this is a much closer call than would normally be the case between a father and grandparents because Grandparents have played a closely supportive role of Mother in raising the children. During these same years, Father was less than a primary nurturing parent of the children. He was out of the home for extended periods. He as uninvolved in the hourly tasks of child-raising. The supportive years made the children ripe for establishment of a child-parent relationship with Grandparents when Mother passed away, much more so than would have been the case for more geographically and emotionally distant grandparents;

48. Grandparents have a more constructive interest in and attitude towards the children than Father. Father is less aware and less sensitive to the children's emotional and developmental needs than Grandparents. Father is not completely oblivious to these concerns. He has made some efforts. However, he lags far behind the Grandparents in this area. This consideration is particularly important where, as here, the children have sustained a substantial loss - the

death of a mother-and need emotional support to deal with that loss;

49. It is desirable to continue all the relationships. In terms of extended relationships it is more desirable to continue relationships, with the maternal extended family rather than with the paternal extended family. While the latter is trying to be supportive, it is substantially more dysfunctional and given to anger, violence and substance abuse. Mother's family is constructively supportive of the children;

50. Grandparents' willingness to facilitate Father's relationship with the children weight heavily in favor of Grandparents. Father's conduct convinces the Court he will remove the children from this area if possible and will do all he can to eliminate contact between the children and Grandparents. His precipitous move to Montana shows that he cannot be trusted when he says the contrary. More importantly, it shows an insensitivity to the children's need for the emotional support of and relationship with Grandparents. Running away for a "fresh start" suggests Father's lack of insight into how to constructively deal with problems;

51. The Court considered the desirability of the children being raised by parents rather than Grandparents. Parents are usually more physically able to parent. Here, Grandparents are reasonably able to physically care for the children, although Father is in better overall health. Children want to be like the majority of their friends and schoolmates, who are raised by one or both parents. This consideration favors Father;

52. It is in the children's best interests to be raised by Grandparents.;

53. The Court's overriding impression of Father is that honesty has no value for him. He had said whatever he believed would help him at the time, without regard to its truthfulness. Father's word alone is insufficient to prove anything. The Court counted over 25 lies by Father ranging from statements to Judge Letourneau regarding remaining in Salem area to statements concerning Ms. Oliver's anger and drug issues. They include denials of statements Dr. Vien attributed to him and denials of the nature and number of restraining order violations;

54. Father acted in bad faith in this action;

55. Father should have substantial parenting time. Because of the distance between Father's and Grandparents' household, midweek parenting time is impractical. Also because of distance, a Friday evening pickup would be a hardship for the children;

56. Mr. Miller is not a psychological parent of the children within the meaning of ORS 109.119 (6) (a) because he did not supply the children's physical needs even when he lived in the same household as them. He also did not reside within the children's household within six(6) months of his motion to intervene;

57. Mr. Miller did not establish that he had an "ongoing personal relationship" within the meaning of ORS 109.119 (6) (d). His relationship had not lasted a year when he moved to intervene. His relationship with the children began in December 1998 when he

began spending most of his time at the children's household. He filed his motion for intervention on October 12, 1999, less than a year later. On December 6, 1999, The Honorable John B. Lewis granted Mr. Miller's Motion to Intervene in this action;

58. Mr. Miller's contact with the children after Father regained their custody was not a substantial continuation of the relationship that had been established before then. He saw the children only on the days Grandparents had the children, and then for only limited times;

59. Even if Mr. Miller's contact with the children prior to July 1999 was of a nature sufficient to establish an "ongoing personal relationship" within the meaning of ORS 109.119 (6) (d), the later contact was not. So, the later contact was not "substantial continuity" of the earlier contact;

60. The Court commends Mr. Miller for his genuine concern for the children and his willingness to emotionally and financially support what he believes are their best interests;

Having made the above findings of fact, it is hereby ORDERED and ADJUDGED that:

II. JUDGMENT OF CUSTODY

1. PARENTING TIME. The children shall reside primarily with Grandparents except for the parenting time set forth specifically below, when they shall have parenting time with Father:

A. Pre-school and School Schedule.

I. The school schedule begins the Saturday before the academic year commences at 9:00 a.m. and ends the Saturday after the academic year recesses at 9.:00 a.m.

ii. Father shall share parenting time with the children on the first, third and (if there is one) fifth weekend of every month beginning at 9:00 a.m. on Saturday and ending on Sunday at 6:00 p.m. A weekend is in a month of Saturday is in the month;

iii. For the month of September 2000, the parenting time set forth in the Pendente Lite Order supercedes any contrary aspect of this Judgment;

B. Winter Vacation Schedule.

I. In all even-numbered years, Father shall have the children beginning at 7:00 p.m. on the day that school adjourns for Winter Vacation until 10:00 a.m. on December 25th of each year; Grandparents shall have the child for the remainder of the children's winter vacation;

ii. In all odd-numbered years, Grandparents shall have the children beginning at 7:00 p.m. on the day that school adjourns for Winter Vacation until 10:00 a.m. on December 25th of each year; Father shall have the child

for the remainder of the child's winter vacation until 7:00 p.m. the day before school resumes;

iii. The alternate weekend parenting time schedule shall not apply during the winter vacation period;

C. Summer Parenting Time.

I. Summer vacation begins the Saturday after school recesses for the summer at 9:00 a.m. and ends the Saturday before school recommences at 9:00 a.m.;

ii. Unless otherwise agreed upon by the parties in writing, summer parenting time for Father shall be divided into three (3) blocks of time starting and ending on Saturday at 9:00 a.m.; each block shall consist of two (2) weeks [i.e., fourteen (14) days subject to remaining vacation time]. The blocks must be at least a week apart.

iii. Before May 1st of each year, Father shall select and notify Grandparents in writing of the inclusive dates of the summer parenting time period which Father chooses to have with the children;

iv. The alternate weekend parenting time does not apply during the Summer Vacation parenting time;

D. Other Holidays, Events and Vacation Days.

i. The residential schedule for the child for the holidays, events and vacation days listed below is as follows:

(a) Thanksgiving Vacation: Thanksgiving begins on Wednesday at 7:00 p.m through the following Sunday at 7:00 p.m. Father shall enjoy Thanksgiving parenting time with the children in odd numbered years, and Grandparents shall enjoy parenting time in even numbered years;

(b) Spring Vacation: Whether or not one (1) or both children are in school, during the period of school spring vacation (measured from the day after school adjourns through the day before school resumes), commencing at 10:00 a.m. and ending at 7:00 p.m., Father shall enjoy parenting time in odd numbered years and Grandparents shall enjoy parenting time in even numbered years;

(c) Mother's Day: Grandparents shall enjoy time every year from 10:00 a.m. through 7:00 p.m.;

(d) Father's Day: Father shall enjoy time every year from 10:00 a.m. through 7:00 p.m.;

(e) Fourth of July: With the party whose summer schedule includes July 4th;

(f) Children's Birthdays: In even years, Grandparents shall enjoy time with the children on each of their birthdays from 5:00 p.m. through 8:00 p.m. on a school day and 10:00 a.m. through 7:00 p.m. on a non-school day; In odd years,

Father shall enjoy parenting time with the children on their birthdays from 5:00 p.m. through 8:00 p.m. on a school day and 10:00 a.m. through 7:00 p.m. on a non-school day;

(g) Father's Birthday: At Father's option, Father shall spend every year with the children on his birthday from 5:00 p.m. through 8:00 p.m. on a school day and 10:00 a.m. through 7:00 p.m. on a non-school day;

(h) Halloween: Halloween is defined as beginning October 31st at 5:30 p.m. and ending at 9:00 p.m. Father shall share parenting time with the children on Halloween in odd years, and Grandparents shall enjoy time with the children on Halloween in even years;

(E) General Provisions:

i. Personal plans. Personal plans of Grandparents or either of the children (for example, school or church activities), will not be reasons for failing to follow the visitation schedule set forth in the court's order;

ii. Addresses and telephone numbers. Unless otherwise ordered by the court, both Father and Grandparents will provide home addresses and home telephone numbers to the other party. In the event Father is taking the child overnight out of the town of Father's residence, Father shall notify

Grandparents of the location and telephone number, if any, of where the child will be sleeping.

iii. Non-assigned time. Unless otherwise agreed, in writing, Grandparents are responsible for the child during all times not awarded to Father.

iv. Delivery and pick-up. All parenting time shall be exercised in a prompt manner. Unless otherwise agreed, or court-ordered, pick-up and delivery shall occur no more than 15 minutes before or 15 minutes after the time specified for parenting time to begin and end. Grandparents shall have the children fed and ready on time for Father's parenting time with sufficient clothing packed and ready for the parenting time. Father shall return all clothing and feed the children a meal before returning the children from the parenting time period. Father will be responsible for all transportation and shall pick the children up and drop them off at the Grandparents' residence;

v. No-shows for scheduled parenting time and make-ups. Only medical reasons will be considered sufficient for postponement of parenting time with Father. If a child is ill and unable to be with Father during his-her parenting time, make-up parenting time shall occur on the following weekend. However, if Father fails to exercise his parenting time, there will be no make-

up parenting time;

vi. Mutual respect towards the other party. All parties shall not make bad, derogatory other otherwise unflattering comments about the other party or in any way attempt to diminish the love, respect and affection that the child has for the other party;

vii. Support of Father's parenting time. Grandparents shall encourage Father's parenting time with the children and the children shall not be permitted to determine whether the children wish to spend time with Father unless agreed to, in writing, by both parties;

viii. Access to records and events. In addition to the parenting time schedule, unless otherwise specifically ordered by the court, Father shall have the right to visit with the child at school, attend the child's school activities (such as an open house or sports activities), and have full access to school teachers and administrators for complete information about the child in school. ORS 107.154 also affirms additional rights in Father unless otherwise ordered by the Court. Each party shall be responsible for keeping themselves advised of the child's activities and events.

ix. Conflicting dates. The holiday schedule takes precedence over the summer and alternating weekend schedule. Due to the holiday parenting time schedule set out in this Judgment, there may be

occasions when one or both of the parties will have the children in his or their home for three (3) weekends in a row. This could happen because any holiday defined in this Judgment shall replace the normal schedule for a given weekend or time period. In other words, some weekends in a year will be lost due to conflicting vacations and holidays;

x. Daily care. The party with whom the children are staying will be responsible for daily care and will make necessary decisions regarding emergency medical or dental care. Father's rights to make daily care decisions do not include leaving a child unattended in violation of Oregon law, haircuts, permanents, or any substantial changes in the child's appearance (e.g. tattoos, ear piercing, etc.) unless authorized by Grandparents;

xi. Daycare. Father shall be responsible for arranging and paying for daycare for the children during his or her parenting time periods.

xii. Emergencies. Each party will immediately notify the other party of any emergency circumstances or substantial changes in health or safety of the child;

xiii. Writing and telephoning. Father shall be allowed to contact the children once per week by telephone, and shall be permitted unmonitored access in writing with the children;

xiv. Current Addresses/Phone Numbers. Father and Grandparents must keep the other party advised of their address and home telephone number. Father may not take the children out of Oregon without written permission of the Grandparents.

F. Legal Custody. Grandparents are awarded sole legal custody of the children. Their rights include, but are not limited to, the right to enroll them in school and make educational decisions on their behalf, to obtain medical, dental, orthodontic, and mental health care for them, to make health care decisions on behalf of the children, to insure them as dependents, and to claim social security benefits on the children's behalf, if available;

G. Dependency Exemptions. Grandparents shall be entitled to claim the children as exemptions, and to take their credits and child care credits (if applicable) for state and federal tax purposes. Father shall execute any and all waivers and forms prescribed by the Department of Treasury, Internal Revenue Service, and the appropriate state taxing authority to effectuate this provision.

H. Darrell Miller's Claims. The Court does not award Mr. Miller visitation with the children.

I. Attorney Fees. Grandparents are permitted to submit an ORCP 68 statement in accordance with that rule in support of their claim for attorneys fees against Father. Father is permitted to submit an ORCP 68 statement in accordance with that rule in support of his claim for attorneys fees against Mr. Miller, if he

chooses to submit a statement in light of the Court's findings;

J. Dr. Vien's Fee. Whether father should be required to contribute to Dr. Vien's fees is reserved for resolution through submission of ORCP 68 Statement(s).

K. Wardrobe and Toys. The Father shall return the children's wardrobe and toys to the Grandparents;

L. Health Records. Father will provide copies of any immunization records for the children that he has in his possession. If he does not have them, he shall provide a list of health providers the children have seen since July 1999 so Grandparents can obtain the applicable health records.

Dated this 15th day of December, 2000.

/s/Steven L. Price
The Honorable Steven L. Price

APPROVED AS TO FORM:

MOORE & KEHOE, LLP

_____

Matthew H. Kehoe, OSB#90310
of Attorneys for Respondent

APPROVED AS TO FORM:

YATES, MATTHEWS & MORASCH, P.C.

Jeffrey F. Renshaw, OSB#93406
Of Attorneys for Intervenor

SUBMITTED BY:

GEVURTZ, MENASHE, LARSON & HOWE, P.C.

Kimberly A. Quach, OSB #95387
Attorneys for Intervenors

ORS 107.159 - RESTRICTIONS ON CHANGE OF RESIDENCE OF MINOR CHILD

In any court order or decree granting custody of a minor child and parenting time or visitation rights relating to the child, except for an order under ORS 107.700 to 107.732, the court shall include in its order a provision requiring that neither parent shall move to a residence more than sixty (60) miles further distant from the other parent without giving the other parent reasonable notice of the change of residence and providing a copy of such notice to the court.

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF WASHINGTON

In the Matter of the Marriage of:

RAYNE ELIZABETH O'DONNELL-LAMONT (deceased)	) Case No. C98-1284
Petitioner,	) DR SUPPLEMENTAL JUDGMENT; MONEY JUDGMENT
and	
MICHAEL DAVID LAMONT, JR.	
Respondent and	
CHRISTINE AND PATRICK O'DONNELL,	
Intervenors,	
and	
DARRELL MILLER,	
Intervenor.	

THIS MATTER is before the court on Intervenors, Christine and Patrick O'Donnell's (Grandparents), Motion for Attorney Fees against Respondent, Michael David Lamont, Jr. (Father). Grandparents are represented by William C. Abendroth and Gevurtz, Menashe, Larson &

Howe, P.C. Father is represented by Matthew H. Kehoe and Moore & Kehoe, LLP. Intervenor, Darrell Miller, is represented by Jeffrey Renshaw and Yates, Matthew & Morasch, PC. Father did not submit a request for attorney fees, and neither party is seeking a request of fees against intervenor, Darrell Miller. The court, after reviewing the motions, pleadings, and taking oral arguments on February 13, 2001, the court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. A judgment on the merits of this case was signed on December 15, 2000. That judgment provided for Grandparents to file a request for attorney fees against Respondent, under the provisions ORCP 68.
2. Grandparents filed a request for attorney fees and Respondent filed objections. Grandparents cured any procedural defects in their initial petition in a supplemental memorandum.
3. The hourly rates and hours expended by Grandparents' attorneys were reasonable. Grandparents' memorandum involved a great deal of original work, and therefore took more time to produce.
4. In this case, there was a substantial presumption against an award of attorney fees to Grandparents. Both parties had a legitimate interest in parenting the children, the constitutionality of the Grandparents' parenting time statute was an unsettled question, and an award of attorney fees might deter others from arguing the constitutionality of similar statutes and from seeking custody of children whom they have a legitimate interest in parenting.
5. Father's dishonesty leading up to and during the trial, as well as Father's argumentative trial presentation,

are the only relevant factors that justify an award of fee. Father's actions caused the Grandparents' attorneys and the court to expend time unnecessarily.

6. The child custody study by Dr. Vien was useful to the court, because it showed the court that Father was dishonest both with Dr. Vien and the court.
7. In earlier attorney fee judgments in this case, Father actively pursued a judgment against Grandparents and thwarted Grandparents' judgment against him.

BASED ON the above findings of fact, the court hereby ORDERS as follows:

1. Attorney Fees. Grandparents shall be awarded a judgment in the amount of $6,000 for attorney fees payable on March 29, 2001. This judgment shall accrue interest at the rate of 9% per annum on any unpaid balance.
2. Costs. Grandparents shall be awarded a judgment in the amount of $2,875, due and payable on March 29, 2001. This judgment shall accrue interest at the rate of 9% per annum on any unpaid balance.

MONEY JUDGMENT PURSUANT TO ORCP 7D(A)
includes Child Support Judgments

1. Judgment Creditor: Christine and Patrick O'Donnell
2. Creditor's Attorney and Address:

Craig M. Cowley, OSB# 85036
Gevurtz, Menashe, Larson & Howe, PC
13635 NW Cornell Rd., Suite 200
Portland, OR 97229

3. Judgment Debtor: Michael David Lamont, Jr.
4. Debtor's Attorney and Address:

Matthew H. Kehoe, OSB# 90310
Moore & Kehoe, LLP
330 NE Lincoln Ste. 200
Hillsboro, OR 97124

5. Judgment Amount:

A. Attorney fees:

1. Amount: $6,000
2. Due and payable: March 29, 2001
3. Other: None

B. Costs:

1. Amount: $2,875
2. Due and payable: March 29, 2001
3. Other: None

6. Prejudgment Interest: None

7. Judgment Interest:

A. Nine percent (9%) per annum simple on any unpaid balance.

DATED this 17 May, 2001

/s/ Steven L. Price
Circuit Court Judge

Submitted by:
Gevurtz, Menashe, Larson & Howe, PC

/s/William C. Abendroth, OSB # 90190
Attorney for Grandparents/Intervenors

FILED: October 16, 2002

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Marriage of:

RAYNE ELIZABETH O'DONNELL -LAMONT (deceased),	) C98 1284 DR) A112960
Petitioner,	)
and	)
MICHAEL DAVID LAMONT, JR.,	)
Appellant,	)
and	)
CHRISTINE O'DONNELL, PATRICK O'DONNELL, and DARRELL MILLER,	)
Respondents.	)

Appeal from Circuit Court, Washington County.

Stephen L. Price, Judge.

Argued and submitted May 3, 2002.

Philip F. Schuster, II, argued the cause for appellant. With him on the briefs was Dierking & Schuster.

Jacqueline Koch argued the cause for respondents Christine O'Donnell and Patrick O'Donnell. With her on the brief was Koch & Deering.

No appearance for respondent Darrell Miller.

Before Edmonds, Presiding Judge, and Kistler and Schuman, Judges.

EDMONDS, P. J.

Reversed and remanded with instructions to enter judgment awarding custody to father.

EDMONDS, P. J.

Father appeals from a judgment that awarded custody of his two children to their maternal grandparents, the parents of father's deceased former wife. [1] We reverse.

We state the facts as we find them on our *de novo* review, in which we are assisted by the trial court's discussion in its letter opinion.[2] Father and mother were married in December 1991 and had two children, Taryn, who was born in September 1992, and Seaira, who was born in January 1996. Early in their marriage they lived in the Detroit Lake area, near grandfather. Later, after a falling out with grandfather and his then wife, they moved to Washington County, near grandparents. Throughout the marriage, mother was the primary caregiver for the children, in part because father

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1 This case originally involved the dissolution of father's and mother's marriage. After mother's death, grandparents intervened in order to file their petition for custody of the children. Darrell Miller, mother's boyfriend at the time of her death, also intervened, seeking visitation rights, and is an additional respondent on appeal. The trial court did not grant Miller visitation rights on the ground that he did not have an "ongoing personal relationship" with the children under ORS 109.119 (5) (d) (1997), and he does not cross-appeal from that decision. In addition, there is evidence in the record concerning the children's paternal grandfather. In this opinion, we use the word "grandparents" to refer to the respondent grandparents and refer to Miller as "Miller". When we use the word "grandfather," we refer to the paternal grandfather.

2 The trial court found that in his testimony father said whatever he believed would help him at the time without regard to its truthfulness. We review father's testimony with that finding in mind.

worked part of the time as a long-haul truck driver, which required him to be gone several nights a week.

Mother and father began having marital difficulties in 1997. In March 1998 mother obtained a Family Abuse Prevention Act restraining order against father. The basis for the order is not entirely clear from the record, and mother appears to have enforced it or ignored it as it suited her. For instance, while the order was in effect and while mother's petition to dissolve the marriage was pending, mother and father traveled together to Hawaii with the children.

The dissolution of mother's and father's marriage became effective in September 1998. The stipulated judgment of dissolution provided that father would have supervised visitation with the children, but there is no evidence that his visitation was in fact supervised. After the dissolution, mother began a relationship with Miller. In December 1998, father came to Miller's residence while mother and the children were present. That conduct resulted in father's arrest, and he was subsequently fined for the violation of the restraining order. In March 1999, Miller, mother, and the children went to Disneyland. While they were there, mother died from a pre-existing heart condition.

At the time of mother's death, father was living in a small travel trailer, which he acknowledged was inappropriate for the children. He therefore agreed that they could stay with grandparents for a time. Grandparents wanted custody of the children, but the parties were not able to agree on permanent arrangements. Father subsequently reasserted his right to custody of the children. In July 1999, grandparents filed this petition while the children were visiting with them, a visit to which father had agreed. They received an order awarding them temporary custody pending a hearing on the merits. Before the hearing occurred, the court returned custody of the children to

father, who promised that he would keep them in the Salem area. Despite that promise, he moved to Montana with the children and with Laura Oliver, his domestic associate. As a result, the court found father in contempt and ordered him to return the children to Oregon; he complied with the order. Father moved to the Detroit Lake area to be near grandfather and grandfather's current wife, a retired schoolteacher. Father, Oliver, the children, and Oliver's youngest child initially lived in a large room over a garage on grandfather's property, but by the time of the hearing they had moved to a house in Mill City. In July 2000, after a hearing on the merits, the trial court awarded permanent custody to grandparents, with significant visitation for father; father appeals that award.

Before discussing the facts related to custody we must first determine the standard by which we evaluate a custody dispute between a parent and nonparents. We recently discussed that question in *Wilson and Wilson*, 184 Or App ___, ___ P3d ___ (October 9, 2002), and will summarize much of that discussion here. The issue involves

the interplay between ORS 109.119 (1997)[3] and decisions of this court, the Oregon Supreme Court, and the United States Supreme Court. The relevant portions of ORS 109.119 (1997) provided:

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3 In 2001 the legislature repealed ORS 109.121 and adopted significant amendments to ORS 109.119. Or Laws 2001, ch 873, §§ 1, 1a. The amendments to ORS 109.119 "apply to petitions filed under ORS 109.119 or 109.121 (1999 Edition) before, on or after the effective date" of the amending act, which was July 31, 2001. Or Laws 2001, ch 873, § 3, *compiled as a note after* ORS 109.119 (2001). Grandparents filed their petition before the effective date of the 1999 version of ORS 109.119. The 2001 amendments, therefore, do not apply to this case. See *Williamson v. Hunt*, 183 Or App 339, 343-44, 51 P 3rd 694 (2002).

"(1) Any person * * * who has established emotional ties creating a child-parent relationship or an ongoing personal relationship with a child, or any legal grandparent may petition or file a motion for intervention with the court having jurisdiction over the custody, placement, guardianship or wardship of that child * * *.

"(2)(a) If the court determines that a child-parent relationship exists and if the court determines by a preponderance of the evidence that custody, guardianship, right of visitation, or other generally recognized right of a parent or person in loco parentis, is appropriate in the case, the court shall grant such custody, guardianship, right of visitation or other right to the person, if to do so is in the best interest of the child. The court may determine temporary custody of the child or temporary visitation rights under this paragraph pending a final order."

Until recently, the leading case on custody and visitation disputes between a biological parent[4] and a third party was *Sleeper and Sleeper*, 328 Or 504, 982 P2d 1126 (1999).[5] In *Sleeper*, the Supreme Court focused on the best

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4 The Oregon cases have all involved a biological parent and a nonbiological nonparent. We do not mean by our references to that fact to suggest that the rights of an adoptive parent would be different from those of a biological parent. See ORS 109.350

5 In both *Sleeper* and the companion case of *Moore and Moore*, 328 Or 513, 982 P 2nd 1131, (1999), the issue arose in dissolution actions in which the husband sought custody. In each case, the husband had treated the children as his own from their births. In *Sleeper* the husband knew that he was not the children's biological father, but in *Moore* the husband learned that fact only during the course of the dissolution proceeding. Those cases, thus, probably present the most compelling circumstance

interests of the child rather than the rights of the biological parent. However, we have recently revisited the issue as a result of the United States Supreme Court's decision in *Troxel v. Granville*, 530 US 57, 120 S Ct 2054, 147 L Ed 2d 49 (2000). In that case, a majority of the justices agreed with Justice O'Connor's statement in the plurality opinion that, "[i]n light of * * * extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody and control of their children." 530 US at 66.[6] They also agreed that, under the circumstances of the specific case, the state trial court's decision to override the biological parent's reasonable choice to limit visitation, merely because the court believed that visitation was "in the best interest of the child," impermissibly infringed on that fundamental parental right. *Id.* at 68-70.

In *Harrington v. Daum*, 172 Or App 188, 18 P3d 456 (2001), and *Newton v. Thomas*, 177 Or App 670, 33 P3d 1056 (2001), we treated the biological parent's fundamental right as a supervening right that would normally trump the interests of the nonbiological parent. Thus, instead of basing custody or visitation decisions under ORS 109.119 (1997) on the "best interest of the child," subject to some undefined "supervening right" of the biological parent, we now give significant weight in that calculus to a fit biological parent's fundamental right to

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for giving the nonbiological parent rights close to or identical with those of a biological parent.

6 Justice O'Connor wrote for three other justices as well as herself. In their separate concurrences, Justices Thomas and Souter acknowledged that the Court's precedents established the fundamental rights that Justice O' Connor described but argued for different ways to analyze the case.

determine the care, custody, and control of his or her children.[7] Thus, the fit biological parent's right is "supervening," in the sense that the right "supervenes" the pure "best interest" analysis itself, replacing it with a legal standard under which a fit biological parent will presumptively prevail over a nonparent, unless the nonparent, by a preponderance of the evidence, ORS 109.119(3)(a) (1997), can overcome the presumption.

To determine the effect of the presumption on the process of weighing the evidence involved in disputed custody cases between biological parents and nonparents, we also take guidance from *Hruby and Hruby*, 304 Or 500, 748 P2d 57 (1987), which governed custody disputes between biological parents and qualifying nonparents before *Sleeper* and which established a standard not unlike the one that we have adopted in response to *Troxel*.[8] In *Hruby*, after a thorough review of Oregon custody cases involving parents and nonparents, the court concluded:

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7 That presumption, of course, is designed for the visitation context, not for a custody decision. The issue in a custody case is not whether we will uphold a parent's specific decision but whether the parent should have the authority to make such decisions in general. Depriving a fit parent of the fundamental right to determine the care, custody, and control of his or her children requires an even stronger showing than ordering visitation over the parent's objection. *Cf. Shofner and Shofner*, 137 Or App 543, 548-49, 905 P 2nd 268 (1995), rev den, 322 Or 644 (1996) (discussing some difference between the two contexts).

8 In *Harrington*, we noted that *Troxel* modified the interpretation of ORS 109.119 (1997) by moving it in the direction of *Shofner*. 172 Or App at 197-98. In *Shofner*, in turn, we indicated that *Hruby* set the appropriate standards for custody cases. 137 Or App at 548-49. Thus, *Hruby* provides guidance here.

> "[A] natural parent has the right to the custody of his or her children, [in the absence of] a compelling reason for placing the children in the custody of another; the 'best interests of the child' standard applicable to custody disputes between natural parents in a marriage dissolution proceeding is not applicable to custody disputes between natural parents and other persons."

304 Or at 510.

The court expressly noted that nonparents could establish compelling reasons to obtain custody without proving that the parent was unfit. Rather, the proper inquiry was whether custody with the parent would be "'highly detrimental' to the child's welfare, regardless of the parent's fitness," *Hruby*, 304 Or at 508; whether custody with the nonparent was necessary "to protect the children from some compelling threat to their present or future well-being," *id.* at 509; and whether there was "good cause" or "cogent reasons," *id.* at 508, to place the child with the nonparent.

The court summarized its conclusions by explaining:

> "We use 'compelling' to emphasize that in a custody dispute between a natural parent and some other person, a court should not be concerned with attempting to maximize a child's welfare, but with determining whether the child will receive adequate care and love from its natural parent and whether the child will be otherwise unduly harmed, physically or psychologically, by giving custody to the natural parent."

Id. at 511. Applying that standard, the court concluded that the child's aunt had not presented sufficiently compelling reasons to acquire custody:

> "The child has an emotional attachment to the father and wishes to be with him (though also with the aunt). In addition, the child stayed at the father's home in San Diego for six weeks without experiencing any apparent psychological or emotional difficulties. Given these facts * * *, we conclude that there is no compelling reason to deny custody to the father. There has been no showing that the child would not receive adequate care and love from the father or that the child would be otherwise unduly harmed, physically or psychologically, by giving custody to him."

Id. at 517-18. *See also Cerda and Cerda*, 136 Or App 104, 109-10, 901 P2d 263 (1995), *rev den*, 322 Or 598 (1996) (applying *Hruby*; father's uncontrolled anger and abusive behavior constitute compelling reasons to place children with grandparents); *Fenimore v. Smith*, 145 Or App 501, 510-11, 930 P2d 892 (1996) (applying *Hruby*; stepfather of adolescent daughter who has suffered "traumatic loss" overcomes parental presumption because removing her from stepfather's house would cause "undue psychological harm" and be "highly detrimental" despite natural parent's fitness).

Thus, to overcome the presumption in favor of father under ORS 109.119(2)(a) (1997), grandparents must establish that the evidence as a whole preponderates in their favor, that is, that father cannot or will not provide adequate love and care for the children or that placement of the children in father's custody will cause them undue physical or psychological harm. Said another way, for a nonparent to prevail on those issues, the weight of the evidence in favor of the nonparent, when considered in light of the evidence in favor of the parent, must be such as to overcome the weight of the presumption. That means that the court must find by a preponderance of the evidence either that the parent cannot or will not provide

adequate love and care or that the children will face an undue risk of physical or psychological harm in the parent's custody. We review the evidence in this case to determine whether grandparents have met that standard. In doing so, we do not balance the benefits to the children of being in father's custody against the benefits of being in grandparents' custody; rather, we determine whether the children would receive inadequate parenting or would suffer undue harm in father's custody.[9]

Grandparents argue that father is deficient in the several respects that the trial court identified in its opinion. Although father's actions have not always been optimal, he has been involved with the children's care and upbringing from their birth to the present, and we agree with the trial court's implicit finding that he is a fit parent. Nonetheless, grandparents point out that his involvement with the children while mother was alive was less than hers; that he has a history of job instability that, among other things, meant that Taryn spent his first grade year in three different schools; that the trial court determined that his testimony was not credible; that there is an alleged history of physical and substance abuse in father's family; that father allegedly used illegal substances and allegedly abused

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9 One of the difficulties with evaluating the trial court's decision is that it relied heavily on the report and testimony of Dr. Vien, a psychologist who conducted an extensive custody evaluation. Vien, however, focused exclusively on the best interests of the children without regard to father's fundamental rights to their care, custody, and control. Thus, his opinions do not deal with the crucial issues that the trial court, and we on *de novo* review, have to decide. The trial court attempted to adapt its opinion to a standard that would take *Troxel* into account, but it was not always fully successful in doing so. For example, the trial court did not evaluate the effect of father's parenting on the children by itself but, rather, compared it to the parenting that it thought they would receive from grandparents. Because Vien did not make his conclusions in light on the correct legal standard, we do not give his opinions the weight that we might otherwise give them.

mother; that Oliver allegedly has a history of anger and substance abuse problems that allegedly led to her loss of custody of her two older children; and that father was relatively unconcerned about the children's needs arising from mother's death and their need for continuing contact with grandparents.

In contravention to the above evidence, there is evidence that father was actively involved with the children's care and upbringing before mother's death, both before and after the dissolution of their marriage. During the marriage, the nature of his employment kept him away at times, and after the dissolution of the marriage the location of his employment at times limited his contact with the children, but the evidence is persuasive that he was regularly involved with the children throughout their lives. After mother's death, his involvement with them increased. Although he has changed employment more frequently than might have been in the best interests of the children, he has always been able to find well-paying jobs. At the time of the hearing, he was the lead person for a business that does commercial tenant improvements and home remodeling. Father's employer testified positively about father's work performance and stated that he would permit father to take time off work if the children's needs required him to do so. We note that the children are bonded both to father and to grandparents, although they are somewhat more strongly bonded to father. As to their care in father's custody, Taryn's first-grade teacher testified that Taryn was doing very well in school, had no emotional or behavioral problems, and had generally overcome his earlier difficulty in reading. Seaira was in an appropriate day care program. On the whole, the evidence indicates that the children did well while in father's custody.

Father's lack of candor with the court is of concern but is not decisive. The evidence concerning father's alleged use of illegal substances and abuse of mother seems to be tied

primarily to the restraining order and his violation of it in December 1998. On the evening that father was arrested for violating the order, mother went with the children to Miller's, explaining to a friend that she was afraid of father. The arrest occurred when father showed up at Miller's residence. The officer who arrested father testified that he cooperated throughout the process and that he was not intoxicated at the time. About a month afterwards, mother brought the children to the trailer park where father lived for a birthday party for the manager's daughter; it was also father's birthday. Father had begun living in the park shortly before the dissolution became final, and mother and the children visited him frequently while he was there. The manager testified that she never saw any indication of intoxication on the part of father or abuse committed by him. As the trial court indicated, mother appears to have used or ignored the restraining order as best suited her own purposes, including her desire to remain in control. Moreover, the psychological testing that Vien conducted did not suggest that father is violent or abusive. In light of the evidence as a whole, neither the order nor the December incident indicates that father is a danger to his children, despite his lack of candor with the court.

The primary source of evidence concerning grandfather is mother's dislike of him, as reflected in "wills" that she wrote prohibiting or strictly limiting the contact that he was to have with the children if both mother and father were to die. In contrast, a long-time deputy sheriff, who had a place near grandfather's marina, testified that neither father nor grandfather had a substance abuse problem and that their interactions with the children were normal and appropriate. As to other people in the children's lives if father were awarded custody, there is no evidence that Oliver currently has problems with anger or drug use, even if she did at one time. Finally, to his credit, father has arranged for appropriate counseling to

help the children resolve the issues arising from their mother's death, and he indicated at trial that he will continue taking them to their counselor as needed.

In summary, we conclude that the evidence produced by grandparents fails to rise to the level necessary to deprive a biological parent of custody of the children. Accordingly, the trial court erred by awarding custody to grandparents.[10]

Reversed and remanded with instructions to enter judgment awarding custody to father.

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10 Grandparents may seek an order under ORS 109.119 providing for visitation with the children in the event that father does not otherwise permit legally adequate visitation in the future.

FILED: March 20, 2003

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Marriage of	
RAYNE ELIZABETH O'DONNELL -LAMONT (deceased),	) C98 1284 DR) A112960
Petitioner,	)
and	)
MICHAEL DAVID LAMONT, JR.,	)
Appellant,	)
and	)
CHRISTINE O'DONNELL,	)
PATRICK O'DONNELL, and DARRELL MILLER,	)
Respondents.	)

En Banc

Appeal from Circuit Court, Washington County.

Stephen L. Price, Judge.

On respondents grandparents' petition for reconsideration filed December 16, 2002, and on respondents grandparents' motion to substitute grandparents' petition for reconsideration filed December 18, 2002, and respondents grandparents' petition for reconsideration (substituted) filed December 19, 2002, and appellant's response to petition for reconsideration filed December 20, 2002. Opinion filed October 16, 2002. 184 Or App 249, 56 P3d 929. Resubmitted en banc March 5, 2003.

Eli D. Stutsman and David L. Heifetz, for petition.

Philip F. Schuster, II, and Dierking & Schuster, *contra.*

Before Deits, Chief Judge, and Edmonds, Landau, Haselton, Armstrong, Linder, Wollheim, Kistler, Brewer, and Schuman, Judges.

EDMONDS, J.

Reconsideration allowed; former opinion modified to state that 2001 amendments to ORS 109.119 are fully retroactive; opinion adhered to as modified by an equally divided court; request for remand denied by an equally divided court.

Kistler, J., concurring.

Deits, C. J., concurring in part and dissenting in part.

Landau, J., concurring in part and dissenting in part.

EDMONDS, J.

Grandparents petition for reconsideration of our decision in this case. *O'Donnell-Lamont and Lamont*, 184 Or App 249, 56 P3d 929 (2002). All members of the court agree that we should allow the petition and modify our former opinion to state that the 2001 amendments to ORS 109.119 are fully retroactive. Five members believe that we should remand for further proceedings in the trial court; five members believe that we should not remand. We therefore deny the request that we remand by an equally divided court. The effect of this decision is that the previous decision as modified remains the effective decision of the court. This opinion contains the opinion of the court on the first issue and an opinion of the author on the remaining issues.

In our original decision, we reversed the trial court's award of custody of the children to grandparents and remanded with instructions to award custody to father. In doing so we analyzed the parties' rights based on our understanding of the United States Supreme Court's decision in *Troxel v. Granville*, 530 US 57, 120 S Ct 2054, 147 L Ed 2d 49 (2000). We did not consider the effect of the 2001 amendments to ORS 109.119, the statute that now governs the custody rights of persons who are not biological or adoptive parents, because grandparents filed their petition before the effective date of the 1999 version of ORS 109.119. *See Williamson v. Hunt*, 183 Or App 339, 343, 51 P3d 694 (2002).

In *Williamson* and in our former opinion in this case, we held that the amendments to ORS 109.119 do not apply to cases in which the petitioner first filed the petition before the effective date of the 1999 edition of ORS 109.119. We based that holding on the version of Oregon Laws 2001, chapter 873, section 3 (section 3) that appears in the 2001 edition of the Oregon Revised Statutes. That provision, as Legislative Counsel compiled it in the published statutes immediately after ORS 109.119, reads:

> "The amendments to ORS 109.119 by section 1 of this 2001 Act apply to petitions filed under ORS 109.119 or 109.121 (*1999 Edition*) before, on or after the effective date of this 2001 Act [*July 31, 2001*]."

(Emphasis added.) The emphasized reference to July 31, 2001, as the effective date of the Act is an insertion that Legislative Counsel made for the reader's convenience; the use of brackets shows as much. What is not clear from the compilation, however, is that the emphasized parenthetical reference to the 1999 edition of the Oregon Revised Statutes as limiting the scope of section 3 is also a Legislative Counsel insertion that

does not appear in the statute as the legislature passed it and the governor signed it.[1] We first discovered that the parenthetical phrase was not part of the original statute when grandparents drew our attention to that fact in their petition for reconsideration. Legislative Counsel's certified compilation of the statutes is *prima facie* evidence of the law. ORS 171.285(2). However, it is not conclusive, and "[w]hen, as here, it appears that the law as the legislature adopted it differs in substance from the law as codified, we must follow the legislature's version." *Mitchell v. Board of Education*, 64 Or App 565, 569, 669 P2d 356, *rev den*, 296 Or 120 (1983). After we delete the reference to the 1999 edition of the statutes, it is clear that the legislature intended in section 3 to make the 2001 amendments to ORS 109.119 applicable to all petitions filed before the effective date of the statute; those amendments therefore apply to this case.[2]

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1 We have examined section 3 both in the official publication of laws adopted at the 2001 regular legislative session and in enrolled House Bill 2427 as it appears on the state archives website.

2 In *Williamson*, we believed that the parenthetical reference to the 1999 edition of the statutes limited the scope of section 3 of Oregon Laws 2001, chapter 873. Our examination of the statute as the legislature passed it, however, suggests an alternative reason for Legislative Counsel to have inserted the reference. Section 2 of the same session law repealed ORS 109.121. Thus, the purpose of stating that the 2001 amendments to apply to petitions filed "under ORS 109.119 or 109.121(1999 edition)" may have been to advise readers where to find *former* ORS 109.121, which was no longer in effect. Whatever the purpose of the reference, the language as enacted by the legislature makes it clear that the 2001 amendments to ORS 109.119 apply to all petitions filed before the statute's effective date. To the extent that our decision in *Williamson* and our statements in *Newton v. Thomas*, 177 Or App 670, 672 n 1, 33 P 3rd 1056 (2001), are inconsistent with that conclusion, all the members of the court agree that they are no longer controlling.

The preceding discussion states the opinion of the court. What follows is the analysis that I believe we should adopt in analyzing the parties' rights in accordance with the version of ORS 109.119 that is presently effective. I then explain my reasons for concurring in the decision, by an equally divided court, to deny grandparents' request for a remand.

ORS 109.119(2)(a) provides that, in any proceeding under the statute, including one to give custody to a nonparent over the legal parent's objection, "there is a presumption that the legal parent acts in the best interest of the child." ORS 109.119(4)(b) then provides:

> "In deciding whether the presumption described in subsection (2)(a) of this section has been rebutted and whether to award custody, guardianship or other rights over the objection of the legal parent, the court may consider factors including, but not limited to, the following, which may be shown by the evidence:
>
> "(A) The legal parent is unwilling or unable to care adequately for the child;
>
> "(B) The petitioner or intervenor is or recently has been the child's primary caretaker;
>
> "(C) Circumstances detrimental to the child exist if relief is denied;
>
> "(D) The legal parent has fostered, encouraged or consented to the relationship between the child and the petitioner or intervenor; or
>
> "(E) The legal parent has unreasonably denied or limited contact between the child and the petitioner or

intervenor."

The presumption in ORS 109.119(2)(a), that the legal parent acts in the best interests of the child, is the legislature's statement of the parent's constitutional right that we described in our previous opinion. Two of the nonexclusive criteria in ORS 109.119(4)(b) are directly relevant to the constitutionally required test of whether the legal parent can provide the care that the constitution requires in order for that parent to retain custody. A legal parent who is unwilling or unable to care adequately for the child, ORS 109.119(4)(b)(A), necessarily "cannot or will not provide adequate love and care" for the child. Whether circumstances detrimental to the child will exist if relief is denied, ORS 109.119(4)(b)(C), is closely related to whether placing the child in the legal parent's custody would cause an undue risk of physical or psychological harm to the child. Those statutory criteria thus relate to the threshold issue of whether the nonparent has rebutted the presumption.

I conclude, for the reasons that we stated in our previous opinion, that the application of those statutory factors in this case leads to the same result that we reached in our previous decision under the constitutional tests, and I would therefore adhere to that result.

Judge Landau agrees that the 2001 amendments to ORS 109.119 apply to this case but would remand so the parties can present further evidence. He argues that *Troxel*, which the Supreme Court decided after the hearing but before the trial court's decision in this case, changed the law in a way that makes the existing record inadequate for our *de novo* review. For the following reasons, I disagree that a remand is appropriate.

First, although the hearing in this case came before *Troxel*, the trial court's decision came afterwards and the court

discussed that decision in its opinion. The parties did not seek to introduce additional evidence in light of *Troxel*. In seeking remand, grandparents focus on the difficulty that the trial court had in applying *Troxel* to the record that the parties made at the hearing; they point out that at the time there were no appellate decisions to assist the court. Grandparents seem to suggest that we should remand so that the trial court can make new findings, primarily on the existing record, that are appropriate under our recent decisions applying *Troxel*. Their argument that we should remand "for further proceedings to develop the record as is necessary in light of the recent change in the law" appears to refer to that point. In any case, grandparents do not assert that they would seek on remand to present different evidence about the underlying facts from those that they presented at the original hearing, nor do they give any suggestion of what additional facts may exist.

My review of the record indicates that, as is usual in custody cases, both sides presented all of the evidence available to them that might support their competing claims to custody of the children. Grandparents do not suggest that we are missing any evidence concerning father's allegedly questionable actions, the alleged benefits that the children received while they lived with grandparents, or the children's progress in both homes, nor are we aware of any.[3] In our previous decision, we reviewed that evidence *de novo* on the record, ORS 19.415(3), giving careful consideration to the findings that the trial court made; I do not see how any additional findings that it might make on remand would assist us. Although the legal standard

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3 The one possible exception is that the expert who conducted the custody evaluation relied on the wrong standard, which affected the weight that we gave his opinions. *O'Donnell-Lamont*, 184 Or App at 257 n 9. However, grandparents do not suggest that they would seek a new evaluation on remand.

changed while the trial court was considering the case, the facts concerning the children's situation and the probable consequences of granting custody to father did not. The present record is adequate for us to review the facts under the correct legal standard as we have determined it.

Second, the decisions that Judge Landau cites in which the Supreme Court remanded for further trial court consideration do not support a remand in this case. In both cases, there were problems with the record that do not exist here. *Massee and Massee*, 328 Or 195, 970 P2d 1203 (1999), involved a division of marital property in which the record concerning an issue that the Supreme Court determined to be crucial was inadequate. This case involves child custody, in which a speedy decision is more important, and grandparents do not suggest that the current record is factually incomplete. In *State ex rel Juv. Dept. v. Lauffenberger*, 308 Or 159, 777 P2d 954 (1989), the Supreme Court expressly noted that the "record of the present proceeding is sparse," consisting largely of previous documents and oral summaries by counsel of what various witnesses would say if called, with no significant oral testimony or cross-examination. *Id.* at 166-67. That sparsity, which contrasts with the ample record in this case, was essential to the court's decision to remand for further evidence.

Finally, the nature of the case argues against a remand. Children need stability, and providing it is an essential goal in child custody cases. *See Colson and Peil*, 183 Or App 12, 21, 51 P3d 607 (2002) (one purpose of change of circumstances rule is to promote stability); *Teel-King and King*, 149 Or App 426, 430, 944 P2d 323 (1997), *rev den*, 327 Or 82 (1998) (same). These parties have litigated the custody of the children for four years, a period that for primary school children (as these children were when the litigation began) can be an eternity. We have finally decided the issue on *de novo* review,

based on a complete record and applying the constitutionally required legal standard. It is now time to put that decision into effect, to end the uncertainty, and to give these children the stability that they have been lacking for so long.

Reconsideration allowed; former opinion modified to state that 2001 amendments to ORS 109.119 are fully retroactive; opinion adhered to as modified by an equally divided court; request for remand denied by an equally divided court.

Armstrong, Kistler, and Schuman, JJ., join in this opinion.

KISTLER, J., concurring.

In their petition for reconsideration, grandparents have asked us to remand this case because "the record necessary to support grandparents' case has been compromised by a post-trial, pre-appeal sea change in the law." I agree with the dissent that, when the parties did not have a fair opportunity to develop the record because the governing legal standards have changed, considerations of fundamental fairness, if not due process, require that we remand the case to give the parties that opportunity. A party, however, who seeks a remand to offer new evidence must do more than say that the standards have changed. A party also has the burden of identifying what sort of evidence he or she would offer on remand. The burden is not onerous; summarizing the sort of evidence that would be offered on remand ordinarily should suffice. *Cf. State v. Phillips*, 314 Or 460, 466, 840 P2d 666 (1992) (describing what is required for an offer of proof); *Benchmark Properties v. Hipolito*, 161 Or App 598, 604-05, 984 P2d 927 (1999) (same).

Grandparents have not met that burden here. As the lead opinion notes, grandparents did not ask the trial court to reopen the record in light of the Supreme Court's decision in *Troxel v.*

Granville, 530 US 57, 120 S Ct 2054, 147 L Ed 2d 49 (2000), nor did they ask us to remand the case for that purpose when they filed their brief in this court. Only after we ruled that father was entitled to custody have grandparents asked us to remand the case because they did not have a fair chance to develop the record at trial. Not only is grandparents' request for a remand somewhat late, but grandparents have not identified what they would introduce on remand that they did not introduce in the original hearing. In the absence of such a showing, I agree with the lead opinion that we need not remand for an evidentiary hearing.

Haselton and Schuman, JJ., join in this concurrence.

DEITS, C. J., concurring in part and dissenting in part.

I agree with the lead opinion that the 2001 amendments to ORS 109.119 apply to this case. For the reasons articulated by Judge Landau, however, I believe that this case should be remanded to develop the factual record. However, because the case will not be remanded, I write separately to emphasize the concerns about the lead opinion's statutory analysis that Judge Landau identifies.

The lead opinion reasons, in part, that, because the 2001 amendments apply,

> "[t]he presumption in ORS 109.119(2)(a), that a legal parent acts in the best interests of the child, is the legislature's statement of the parent's constitutional right that we described in our previous opinion. Two of the nonexclusive criteria in ORS 109.119(4)(b) are directly relevant to the constitutionally required test of whether the legal parent can provide the care that the constitution requires in order for that parent to retain custody. A legal parent who is unwilling or unable to

> care adequately for the child, ORS 109.119(4)(b)(A), necessarily 'cannot or will not provide adequate love and care' for the child. Whether circumstances detrimental to the child will exist if relief is denied, ORS 109.119(4)(b)(C), is closely related to whether placing the child in the legal parent's custody would cause an undue risk of physical or psychological harm to the child. Those statutory criteria thus relate to the threshold issue of whether the nonparent has rebutted the presumption.
>
> "I conclude, for the reasons that we stated in our previous opinion, that the application of those statutory factors in this case leads to the same result that we reached in our previous decision under the constitutional tests, and I would therefore adhere to that result."

187 Or App at 19-20 (slip op at 4-5).

Our analysis in the custody cases that we have decided under ORS 109.119 (1997) was statutory. In other words, using the methodology of *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993), we interpreted ORS 109.119 (1997) as incorporating the federal constitutional presumption that gives effect to father's fundamental due process right to the care, custody, and control of his children, and our holdings were based on the application of that statute. A new statute applies to this case. We cannot assume that the new statutory language will be interpreted to incorporate or reflect the constitutional presumption or the factors necessary to rebut that presumption as we have described them. Instead, we must interpret the statutory language and apply it to the facts of a case, and, if a nonparent receives custody under the statute, we must determine whether the application of the statute has infringed on the fundamental right of the parent to the care,

custody, and control of his or her child.

The lead opinion implies that the presumption under the statute is equivalent to the constitutional presumption and that two statutory factors are equivalent to the two necessary factors that we have identified to rebut the constitutional presumption. That may not be correct. For example, by definition, the term "'[c]ircumstances detrimental to the child' includes but is not limited to circumstances that may cause psychological, emotional or physical harm to a child." ORS 109.119(8)(b). That definition could be interpreted to be broader than the prong of the constitutional analysis concerning whether the child will face an undue risk of physical or psychological harm. Additionally, in *State v. Wooden*, 184 Or App 537, 546-51, 57 P3d 583 (2002), we reasoned that a parent who has established a sufficient relationship with the child has the fundamental right and is entitled to the presumption. However, under the statute, a legal parent is entitled to the presumption.[4] ORS 109.119(2)(a). The lead opinion implies, without any analysis, that the constitutional presumption and the two factors necessary to rebut it are a part of the statute. However, the opinion does not explore the relationship between the statute and the constitutional presumption that effectuates a parent's fundamental right nor does it explore the relationship between the two statutory factors that it identifies and the other nonexclusive statutory factors.

As Judge Landau correctly asserts:

> "I suppose that it could be argued that, if the statute merely 'codifies' the *Troxel*[*v. Granville*, 530 US 57, 120 S Ct 2054, 147 L Ed 2d 49 (2000),] decision, the

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4 A legal parent is "a parent as defined in ORS 419A.004 whose rights have not been terminated under ORS 419B.500 to 419B.524." ORS 109.119 (8) (d).

> parties would be in no position to complain that they could not have adequately developed the record. But the argument rests on an assumption that the statute has such a limited effect. That assumption is debatable, to say the least. And we have not yet had occasion to decide the matter. Indeed, to determine whether the assumption is well founded would require us, among other things, to interpret the new statute, determine its constitutionality, address the standard of proof that it prescribes, and articulate its relationship to *Troxel*--all that simply to decide whether to remand the case. It strikes me that the better use of our resources is to address those questions as they arise, and are briefed, in concrete cases."

187 Or App at 29-30 (Landau, J., concurring in part, dissenting in part) (slip op at 4-5).

I agree that, in this case, even though the amendments apply, there is no need for us to apply them on reconsideration. If we were to apply ORS 109.119 (2001), it would result in a determination either that father receive custody under the statute's terms or that grandparents receive custody. A determination that father receive custody is consistent with the result in our former opinion. A determination that grandparents receive custody would require that we then determine whether father's substantive due process right to the care, custody, and control of his children was infringed through an application of the statute that results in an award of custody to grandparents. That is essentially what we did in our former opinion in this case. As we explained:

> "Thus, to overcome the presumption in favor of father under ORS 109.119(2)(a) (1997), grandparents must establish that the evidence as a whole preponderates in their favor, that is, that father cannot or will not provide

> adequate love and care for the children or that placement of the children in father's custody will cause them undue physical or psychological harm. Said another way, for a nonparent to prevail on those issues, the weight of the evidence in favor of the nonparent, when considered in light of the evidence in favor of the parent, must be such as to overcome the weight of the presumption. That means that the court must find by a preponderance of the evidence either that the parent cannot or will not provide adequate love and care or that the children will face an undue risk of physical or psychological harm in the parent's custody. We review the evidence in this case to determine whether grandparents have met that standard. In doing so, we do not balance the benefits to the children of being in father's custody against the benefits of being in grandparents' custody; rather, we determine whether the children would receive inadequate parenting or would suffer undue harm in father's custody."

O'Donnell-Lamont and Lamont, 184 Or App 249, 256-57, 56 P3d 929 (2002). Based on the reasoning in our former opinion, the statute could not be applied to deny father custody of his children because grandparents have not rebutted the constitutional presumption in his favor. Thus, there is no reason to apply ORS 109.119 (2001) on reconsideration because we have already determined the legally required result.

I respectfully dissent.

Landau, Linder, and Brewer, JJ., join in this dissent.

LANDAU, J., concurring in part, dissenting in part.

I agree that the 2001 amendments to ORS 109.119 apply to this case. Where I part company with the lead opinion

is its decision to apply those amendments to this case for the first time on appeal without remanding to give the parties an opportunity to develop a record that addresses the requirements of the new law. In my view, we should remand the case to the trial court if not out of considerations of due process then at least out of considerations of basic fairness.

In *Jones v. General Motors Corp.*, 139 Or App 244, 264, 911 P2d 1243 (1996), *aff'd on other grounds*, 325 Or 404, 939 P2d 608 (1997), we declined to apply for the first time on appeal amendments to the summary judgment standard provided in ORCP 47 C. We explained that "[t]he goal posts have moved. * * * Due process requires that plaintiff be given an opportunity * * * to meet the new evidentiary burdens imposed by the amendment * * *." 139 Or App at 264; *see also State v. Meyers*, 153 Or App 551, 559-60, 958 P2d 187 (1998) (declining to apply new evidentiary standard for first time on appeal because "[s]uch a moving of the proverbial goal posts after the contest is over raises serious questions of due process"). In this case, the goal posts certainly have moved from the time that this case was tried. At the time this case was tried, the United States Supreme Court had not even issued its decision in *Troxel v. Granville*, 530 US 57, 120 S Ct 2054, 147 L Ed 2d 49 (2000), and the 2001 amendments to ORS 109.119 were still a year off. Under *Jones*, it strikes me that we have an obligation to remand the case.

Having said that, I will confess that I am not certain that *Jones* was correct in asserting that a remand in such circumstances is required as a matter of federal due process principles. I am not aware of any United States Supreme Court decision holding that the retroactive application of a nonparental statute violates the Due Process Clause of the Fourteenth Amendment. Moreover, even if *Jones* is correct in the abstract, it is not clear that it would apply in a case such as

this, in which it could be argued that grandparents do not have the sort of liberty interest that triggers due process procedural protections. *See, e.g., Graham v. Children Services Division*, 39 Or App 27, 30-34, 591 P2d 375, *rev den*, 286 Or 521 (1979) ("grandparents have no liberty interest * * * and no rights superior to a nonrelative applying for permission to adopt").

Even if federal due process principles do not require a remand, however, we have discretion to remand based on considerations of basic fairness. In that regard, I note that it is not uncommon for the Oregon Supreme Court to remand domestic relations cases for taking additional evidence after the court announces a new principle of law or when it merely finds a record inadequate. In *Massee and Massee*, 328 Or 195, 970 P2d 1203 (1999), for example, the Supreme Court determined that the presumption of equal contribution to marital assets applies to the appreciation of assets that one spouse brings into the marriage. The question then arose whether the husband in that case actually had rebutted the presumption. In that regard, the court noted that the record was less than adequate, particularly with respect to the wife's contributions as a homemaker. The court explained that it could resolve the case simply by ruling *de novo* on the record before it or by remanding it to the Court of Appeals to do the same. But the court rejected both of those approaches, explaining:

> "The record in this case lacks evidence on several important facts, including husband's net worth at the time of marriage and at the time of dissolution, which likely will influence, if not control, any ultimate property division after remand. Resolution of this case thus requires further development of the factual record. Consequently, we remand the case to the trial court for the taking of additional evidence and reconsideration in light of this opinion."

Id. at 209.

Similarly--and closer to home--in *State ex rel Juv. Dept. v. Lauffenberger*, 308 Or 159, 777 P2d 954 (1989), the Supreme Court addressed whether the juvenile court erred in applying a "best interests of the child" standard in deciding whether to place a child with the father or with third parties. During the pendency of the appeal, the court issued its decision in *Hruby and Hruby*, 304 Or 500, 510, 748 P2d 57 (1987), in which it held that, in private custody disputes, in the absence of a "compelling reason" for placing a child with another person, the natural parents have the right to the care and custody of the child. In *Lauffenberger*, the court then held that the "compelling reason" standard announced in *Hruby* also applied to juvenile court custody decisions. *Lauffenberger*, 308 Or at 164-66. The court did not simply review the juvenile court's decision in light of the new standard, however. It remanded to the juvenile court to develop the record under the standard required by *Hruby:*

> "Deciding the case before *Hruby*, the [juvenile] court made no specific findings with respect to potential harm from parental custody that *Hruby* called for in ordinary private custody disputes nor with respect to any other factors that might play a role under the juvenile court statute. * * *
>
> "Under the circumstances, * * * we do not order a change of custody. That will be for the circuit court to decide on remand and on a new and more complete record, if the father still desires custody."

Lauffenberger, 308 Or at 167-68.

In light of decisions such as *Massee* and *Lauffenberger*, I see no reason, as a matter of simple fairness, not to give the

parties to this case an opportunity to develop a record that responds to the changes in the law that have occurred since the original trial. As I have noted, when this case was tried, *Troxel* had not yet been decided. By the time the trial court issued its letter opinion, the decision had been issued, and the court even mentioned the case in two footnotes. But the fact remains that the parties did not have the opportunity to develop a record that directly responds to the presumption that the *Troxel* decision established.

Even assuming that *Troxel* was fairly before the parties at trial, the fact remains that the legislature did not enact the amendments to the statute that the lead opinion now applies until a year later. Thus, in this case, the lead opinion reverses the trial court because the record that the grandparents developed at trial failed to satisfy a statutory standard that did not even exist at the time. To me, that is fundamentally unfair.

I suppose that it could be argued that, if the statute merely "codifies" the *Troxel* decision, the parties would be in no position to complain that they could not have adequately developed the record. But the argument rests on an assumption that the statute has such a limited effect. That assumption is debatable, to say the least. And we have not yet had occasion to decide the matter. Indeed, to determine whether the assumption is well founded would require us, among other things, to interpret the new statute, determine its constitutionality, address the standard of proof that it prescribes, and articulate its relationship to *Troxel*--all that simply to decide whether to remand the case. It strikes me that the better use of our resources is to address those questions as they arise, and are briefed, in concrete cases.

The lead opinion acknowledges that there has been a change in the legal standard during the course of this case but insists that there is no reason to remand for essentially two

reasons.

First, the lead opinion complains that grandparents failed to request the trial court to reopen the record when *Troxel* first was published. Grandparents prevailed at trial, however. Under those circumstances, it is not clear to me why it was incumbent on grandparents to seek to reopen the record. In any event, the legislature did not amend ORS 109.119 until a year later, long after any party could have asked the trial court to reopen the record. It is that new statute that the lead opinion invokes in reaching its decision in this case.

Second, the lead opinion complains that grandparents do not identify the specific evidence that they wish to add to the record. That is true enough, but of little consequence. In *Massee* and *Lauffenberger*, the parties did not even request remands, and the Supreme Court gave no indication that such requests are necessary, much less that parties are required to identify the evidence that needs to be added to the record. In this case, grandparents have made clear that they were not given an opportunity to develop a record with the criteria of the amended statute in mind and wish to be given that opportunity. That seems sufficient to me. Indeed, given the fact that this was such a close case, and given the importance of credibility in evaluating the record, it strikes me that a remand would be appropriate even without the need for additional evidence.

The concurrence similarly argues that a party seeking a remand must identify the sort of evidence he or she would offer on remand. I am aware of no case imposing such a requirement, and, as I have noted, *Massee* and *Lauffenberger* appear to be quite to the contrary.

In short, we should not decide cases on the basis of standards that did not even exist at the time of trial. We should remand this case as grandparents request so that they may

develop a record that responds to *Troxel* and to the specific demands of the 2001 amendments to ORS 109.119.

Deits, C. J., and Linder, Wollheim, and Brewer, JJ., join in this opinion.

IN THE SUPREME COURT OF THE
STATE OF OREGON

In the Matter of the Marriage of;

RAYNE ELIZABETH O'DONNELL LAMONT (deceased),

Petitioner,

and

MICHAEL DAVID LAMONT, JR.

Respondent-Appellant
Respondent on Review,

and

CHRISTINE O'DONNELL, PATRICK O'DONNELL, and DARRELL MILLER

Intervenors-Respondents,
Petitioners on Review

and

DARRELL MILLER

Intervenor-Respondent

) Washington
) County
) Circuit Court
) Case No. C98
) 1284 DR
)
)
) SC S50551
) CA A112960
)
)
)
)ORDER DENYING
)PETITION FOR
)RECONSIDERA-
)TION
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Upon consideration by the court.

The court has considered the petition for reconsideration and orders that it be denied.

Dated this 27th day of July 2004.

WALLACE P. CARSON, JR
CHIEF JUSTICE

Kistler, J., not participating.

a: Philip F. Schuster, II
Jacqueline L. Koch
Eli D. Stutsman
Jefferey F. Renshaw

CONSTITUTIONAL PROVISIONS:

The Fourteenth Amendment to the United States Constitution provides in relevant part:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

CURRENT ORS 109.119 (2001 EDITION):

109.119 Rights of person who establishes emotional ties creating child-parent relationship or ongoing personal relationship; presumption regarding legal parent; motion for intervention. (1) Except as otherwise provided in subsection (9) of this section, any person, including but not limited to a related or nonrelated foster parent, stepparent, grandparent or relative by blood or marriage, who has established emotional ties creating a child-parent relationship or an ongoing personal relationship with a child may petition or file a motion for intervention with the court having jurisdiction over the custody, placement or guardianship of that child, or if no such proceedings are pending, may petition the court for the county in which the child resides, for an order providing for relief under subsection (3) of this section.

(2)(a) In any proceeding under this section, there is a presumption that the legal parent acts in the best interest of the child.

(b) In an order granting relief under this section, the court shall include findings of fact supporting the rebuttal of the presumption described in paragraph (a) of this subsection.

(c) The presumption described in paragraph (a) of this subsection does not apply in a proceeding to modify an order granting relief under this section.

(3)(a) If the court determines that a child-parent relationship exists and if the court determines that the presumption described in subsection (2)(a) of this section has been rebutted by a preponderance of the evidence, the court shall grant custody, guardianship, right of visitation or other right to the person having the child-parent relationship, if to do so is in the best interest of the child. The court may determine temporary custody of the child or temporary visitation rights under this paragraph pending a final order.

(b) If the court determines that an ongoing personal relationship exists and if the court determines that the presumption described in subsection (2)(a) of this section has been rebutted by clear and convincing evidence, the court shall grant visitation or contact rights to the person having the ongoing personal relationship, if to do so is in the best interest of the child. The court may order temporary visitation or contact rights under this paragraph pending a final order.

(4)(a) In deciding whether the presumption described in subsection (2)(a) of this section has been rebutted and whether to award visitation or contact rights over the objection of the legal parent, the court may consider factors including, but not limited to, the following, which may be shown by the evidence:

(A) The petitioner or intervenor is or recently has been the child's primary caretaker;

(B) Circumstances detrimental to the child exist if relief is denied;

(C) The legal parent has fostered, encouraged or consented to the relationship between the child and the petitioner or intervenor;

(D) Granting relief would not substantially interfere with the custodial relationship; or

(E) The legal parent has unreasonably denied or limited contact between the child and the petitioner or intervenor.

(b) In deciding whether the presumption described in subsection (2)(a) of this section has been rebutted and whether to award custody, guardianship or other rights over the objection of the legal parent, the court may consider factors including, but not limited to, the following, which may be shown by the evidence:

(A) The legal parent is unwilling or unable to care adequately for the child;

(B) The petitioner or intervenor is or recently has been the child's primary caretaker;

(C) Circumstances detrimental to the child exist if relief is denied;

(D) The legal parent has fostered, encouraged or consented to the relationship between the child and the petitioner or intervenor; or

(E) The legal parent has unreasonably denied or limited contact between the child and the petitioner or intervenor.

(5) In addition to the other rights granted under this section, a

stepparent with a child-parent relationship who is a party in a dissolution proceeding may petition the court having jurisdiction for custody or visitation under this section or may petition the court for the county in which the child resides for adoption of the child. The stepparent may also file for post-judgment modification of a judgment relating to child custody.

(6)(a) A motion for intervention filed under this section shall comply with ORCP 33 and state the grounds for relief under this section.

(b) Costs for the representation of an intervenor under this section may not be charged against funds appropriated for public defense services.

(7) In a proceeding under this section, the court may:

(a) Cause an investigation, examination or evaluation to be made under ORS 107.425 or may appoint an individual or a panel or may designate a program to assist the court in creating parenting plans or resolving disputes regarding parenting time and to assist the parties in creating and implementing parenting plans under ORS 107.425 (3).

(b) Assess against a party reasonable attorney fees and costs for the benefit of another party.

(8) When a petition or motion to intervene is filed under this section seeking guardianship or custody of a child who is a foreign national, the petitioner or intervenor shall serve a copy of the petition or motion on the consulate for the child's country.

(9) This section does not apply to proceedings under ORS chapter 419B.

(10) As used in this section:

(a) ""Child-parent relationship"" means a relationship that exists or did exist, in whole or in part, within the six months preceding the filing of an action under this section, and in which relationship a person having physical custody of a child or residing in the same household as the child supplied, or otherwise made available to the child, food, clothing, shelter and incidental necessaries and provided the child with necessary care, education and discipline, and which relationship continued on a day-to-day basis, through interaction, companionship, interplay and mutuality, that fulfilled the child's psychological needs for a parent as well as the child's physical needs. However, a relationship between a child and a person who is the nonrelated foster parent of the child is not a child-parent relationship under this section unless the relationship continued over a period exceeding 12 months.

(b)"Circumstances detrimental to the child" includes but is not limited to circumstances that may cause psychological, emotional or physical harm to a child.

(c)"Grandparent" means the legal parent of the child's legal parent.

(d)"Legal parent" means a parent as defined in ORS 419A.004 whose rights have not been terminated under ORS 419B.500 to 419B.524.

(e)"Ongoing personal relationship" means a relationship with substantial continuity for at least one year, through interaction, companionship, interplay and mutuality.

FORMER ORS 109.119 (1997 Edition)

Rights of grandparent, person who establishes emotional ties creating child-parent relationship or person who has ongoing personal relationship; costs for intervenor representation.

(1) Any person, including but not limited to a related or nonrelated foster parent, stepparent or relative by blood or marriage who has established emotional ties creating a child-parent relationship or an ongoing personal relationship with a child, or any legal grandparent may petition or file a motion for intervention with the court having jurisdiction over the custody, placement, guardianship or wardship of that child, or if no such proceedings are pending, may petition the court for the county in which the minor child resides for an order providing for relief under subsection (2) of this section.

(2) (a) If the court determines that a child-parent relationship exists and if the court determines by a preponderance of the evidence that custody, guardianship, right of visitation, or other generally recognized right of a parent or person in loco parentis, is appropriate in the case, the court shall grant such custody, guardianship, right of visitation or other right to the person, if to do so is in the best interest of the child. The court may determine temporary custody of the child or temporary visitation rights under this paragraph pending a final order.

(b) If the court determines that an ongoing personal relationship exists and if the court determines by clear and convincing evidence that visitation or contact rights are appropriate in the case, the court shall grant visitation or contact rights to the person having the ongoing personal relationship if to do so is in the best interest of the child. The court may order temporary visitation rights under this paragraph pending a final order.

(3) In addition to the rights granted under subsection (1) or

(2) of this section, a stepparent with a child-parent relationship who is a party in a dissolution proceeding may petition the court having jurisdiction for custody or visitation or may petition the court for the county in which the minor child resides for adoption of the child. The stepparent may also file for post decree modification of a decree relating to child custody.

(4) (a) A motion for intervention filed by a person other than a legal grandparent may be denied or a petition may be dismissed on the motion of any party or on the court's own motion if the petition does not state a prima facie case of emotional ties creating a child-parent relationship or ongoing personal relationship or does not allege facts that the intervention is in the best interest of the child.

(b) A motion for intervention filed by a legal grandparent may be granted upon a finding by clear and convincing evidence that the intervention is in the best interests of the child.

(5) As used in this section:

(a) "Child-parent relationship" means a relationship that exists or did exist, in whole or in part, within the six months preceding the filing of an action under this section, and in which relationship a person having physical custody of a child or residing in the same household as the child supplied, or otherwise made available to the child, food, clothing, shelter and incidental necessaries and provided the child with necessary care, education and discipline, and which relationship continued on a day-to-day basis, through interaction, companionship. Interplay and mutuality, that fulfilled the child's psychological needs for a parent as well as the child's physical needs. However,

a relationship between a child and a person who is the nonrelated foster parent of the child is not a child-parent relationship under this section unless the relationship continued over a period exceeding18 months.

(b) "Legal grandparent" means the legal parent of the child's legal parent.

(c) "Legal parent" means a parent as defined in ORS 419A.004 whose rights have not been terminated under ORS 419B.500 to 419B.524.

(d) "Ongoing personal relationship" means a relationship with substantial continuity for at least one year, through interaction, companionship, interplay and mutuality.

(6) In no event shall costs for the representation of an intervenor under this section be charged against funds appropriated for indigent defense services.

(7) In a proceeding under this section, the court may assess against any party a reasonable attorney fee and costs for the benefit of any other party.

EXCERPT FROM FATHER'S BRIEF ON MERITS BEFORE THE SUPREME COURT OF THE STATE OF OREGON (PAGES 38-41). THE FIFTY-STATE SURVEY

The pre -*Troxel* fifty-state survey of nonparent custodial standards has been updated through July of 2003. The custodial standards may still be grouped into the above three broad categories.

(a) The strict parental fitness test

Six states apply a strict fitness test, requiring a nonbiological parent to prove a natural parent unfit.[49] Eight states require a showing of unfitness or exceptional circumstances.[50] Six states require a showing of unfitness or

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49 Kansas — K.S.A. section 60-1610 (a) (5) (C) (pertaining to types of temporary residency arrangements with nonparents if neither parent found to be fit); Nebraska — *Combs v. O'Neal*, 662 NW 2nd 231 (2003); West Virginia — *In Re Jade E.G.*, 575 SE 2nd 325 (W. Va. 2002) (parent has natural right to custody unless parent is unfit); for Iowa, Oklahama and Wisconsin, see *supra* 36 Will. L. Rev. at 604 n. 201 (App 16)

50 New Hampshire — *In Re Nelson*, 825 A2d 501, 503 (N.H. 2003) (*Troxel* presumption governs custodial adjudications, and may be rebutted "[o]nly in the most unusual and serious of cases" by a showing of unfitness, abuse or neglect); Maryland — *Shurupoff v. Vockroth*, 814 A. 2d 543 (MD 2003) (rejecting clear and convincing evidence standard for rebutting parental presumption); South Dakota — S.D. codified laws, section 25-5-29, 25-5-30, 29 A-5-106 (2003); *Meldrum v. Novotny*, 640 NW 2d 640 (S.D. 2000) (third party required to establish by clear and satisfactory proof that parent is unfit); Tennessee — *Ray v. Ray*, 83 SW 3d 726 (Tenn. App. 2001) (finding that parent is unfit must be supported by clear and convincing evidence; third party must demonstrate child will be exposed to substantial harm if custody awarded to parent; *In Re Madelaine Sierra Redmond*, 2002 Tenn. Appl, LEXIS, 528 (Tenn. Ct. App. 2002) (severe emotional harm); Vermont — *Paquette v. Paquette*,

detriment to the child.[51] Six states seem to utilize a two-pronged test, employing strict fitness together with a best interest standard.[52]

All together, twenty-six state jurisdictions apply a strict parental fitness custodial standard or a variation, with most requiring a high-threshold showing of unfitness or extraordinary circumstances, gross misconduct, or conduct detrimental to the child.

(b) The intermediate or parental presumption-best interest

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499 A. 2d 23 (Vermont 1985); Minnessota — *In Re Custody of N.A.K.*, 649 NW 2d 116 (Minn. 2002) (parental presumption must be overcome by "extraordinary circumstances of a grave and weighty nature"). For Nevada, New Mexico and *Vermont* see, also, *supra*, 36 Will. L. Rev supra at 604-605 n. 202. (App 16-17)

51 Alaska — *Todd v. Todd*, 989 P 2d 141, 143 (Alaska 1999) ("parental custody is preferable" but will be "refused when clearly detrimental to the child."); Colorado — Colo. rev. stat. Section 14-10-123 (1) (b) (c) (West 2003); People ex rel A.M.K., 68 P 3d 563 (Colo. App 2003) (presumption is that child's best interest are served by custody with fit biological father); Oregon — ORS 109.119 (2001); *O'Donnell-Lamont v. Lamont*, 184 Or App 249 (2002), affirm. On recons. 187 Or App. 14 (2003), rev. allowed (2003) (*Troxel* presumption rebutted by showing either parent unable to adequately care for chid or will cause child undue harm).
Washington — RCW, section 26.10.030 (West 2003); *In re Custody of Anderson*, 890 P 2d 525, 523 (Washington Ct. App. 1995), rev. den. 898 P 2d 308 (1995); For Florida, New York and Washington see, also, 36 *supra* Will. L. Rev. at 605 n. 203 (App 17)

52 Alabama — N.L.R. v. C.A.D. 2003 Ala Civ. App., LEXIS 304 (Ala. Civ. App. 2003) (parental presumption only overcome by competent evidence that parent is unfit or unsuited for custody); For Arkansas, Hawaii, Massachusetts, Mississippi, and New Jersey, see, 36 Will. L. Rev. at 605 n 204 Id. (App 17-18).

standard.

Six states and the District of Columbia apply a rebuttal presumption that custody to the natural parent is in the child's best interest, which may be rebutted by clear and convincing evidence.[53] Five states require a showing that custody to the natural parent would be detrimental to the child, or would substantially harm the child, and that an award to the third party is required to serve the child's best interest.[54] Six states now employ a presumption that the natural parent has a superior or paramount status that may be forfeited, the court then applying

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53 Arizona — A.R.S., section 25-415 (nonparent must establish intervenor standing by, inter alia, establishing in *loco parentis* standing with the child and that custody with parent would be "significantly detrimental" to the child; *Troxel* presumption is rebutted by showing "by clear and convincing evidence that awarding custody to a legal parent is not in the child's best interest.") California — Cal. Fam. Code, section 3041 (West 2003); Georgia — *Clark v. Wade*, 544 SE 2d 99, 107 (Ga. 2001) (parental presumption rebutted by third party showing that parental custody would physically or emotionally harm the child; showing must be made by clear and convincing evidence); Indiana — Ind. Code, sec. 31-9-2-35.5 (defining "de facto custodians"); *In Re Guardianship of L.L.*, 745 NE 2d 222 (Ind. App. 2002); *In Re Guardianship of B.H.*, 770 NE 2d 283 (Ind. 2002). Michigan — Mich. Comp. Laws, section 722.25, Sec. 5.1; *Greer v. Alexander*, 639 NW 2d 39 (Mich. App. 2001); *Heltzel v. Heltzel*, 638 NW 2d 123 (Mich. App 2001); Virginia — Va. Code Ann. Sec. 20-124.2B (third person must have a "legitimate interest); District of Columbia — appeal of H.R. 581 A 2d 1141, 1144 (D.C. 1990); *In Re Minor Child T.C.*, 2002 W.L. 32113968 (Unpublished); see *supra* 36 Will. L. Rev. at 606 n. 206 (App 18-19)

54 For Connecticut (detrimental), Louisiana (substantial harm), Missouri (unfit, unsuitable or unable to be custodian; special and extraordinary reasons), Ohio (detriment or harmful effect) and Texas (child will be significantly impaired whether physically or emotionally). See, also 36 Will. L. Rev. *supra* at 607 n. 207. (App 19)

the best interest test.[55]

Seventeen states now employ the intermediate parental presumption standard. At least thirty states (26 states plus Louisiana, Missouri, Pennsylvania, Texas) require either a showing of unfitness or a relatively high threshold of harm (substantial harm).

(c) The Strict Best Interest Standard.

Prior to the Supreme Court's *Troxel* decision, approximately eleven states employed a strict best interest standard in custodial disputes between natural parents and third persons.[56] Post-*Troxel*, only seven states now employ a pure best interest custodial standard.[57] It is expected that in view of

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55 North Carolina — *Adams v. Tessener*, 550 SE 2d 499 (N.C. 2001) (father's conduct found to be inconsistent with this protected interest in child); *Owenby v. Young*, 597 SE 2d 264 (N.C. 2003) (maternal grandmother failed to establish by clear and convincing evidence that father forfeited his constitutionally protected parental status). Three states still require a showing that a "psychological parent" status exists. North Dakota — *Cox v. Cox*, 613 NW 2d 516 (N.D. 2000) (court found lack of "exceptional circumstances" to award custody of child to third-party couple as the wife had desired); Pennsylvania — *Douglas v. Wright*, 801 A2d 586 (Pa. Super. Ct. 2002) (See, 36 Will. L. Rev. *supra* at 608 n. 209). For Illinois and South Carolina, see supra 36 Will. L. Rev. 607 n 208; For Montana, North Dakota (serious hard or detriment) and Pennsylvania, see also supra at 608 n 209. (App 20)

56 See, *supra*, 36 Will. L. Rev. supra 609 n. 213

57 Idaho — Idaho Code, Sec. 32.717(3); Kentucky — Ky. Rev. Stat. Ann. Sec. 620.027 (West 2003) (best interest test utilizes where child residing with grandparent in a stable relationship); *Sullivan v. Tucker*, 29 SW 3d 805 (Ky 2000); *Consalvi v. Cawood*, 63 SW 3d 195 (Ky. App. 2002) (third party not found to be *de facto* custodian even though he was primary caregiver and financial supporter under the statute, KRS 405.020); For Delaware, Idaho, Kentucky, Maine, Rhode Island, Utah

the *Troxel* holding, each of the remaining seven holdout states will either statutorily or judicially engraft the *Troxel* parental presumption into the nonparent custodial standard.

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and Wyoming see, *supra*, 36 Will. L. Rev. supra 609 n. 23. (App 20-21)

EXCERPTS FROM TRIAL COURT RECORD:

EXCERPT FROM FATHER'S TRIAL MEMORANDUM P.9

Father has supervening rights over third parties which he retains unless he has abdicated those rights

Holdings of the United States Supreme Court and Oregon Courts have recognized that, at a minimum, an extremely high burden is placed upon third persons to establish contact rights under any set of circumstances where the parent is fit. The father is the natural parent and has supervening rights which include the right to uninterrupted custody, absent a showing that he is unfit, abusive, neglectful, or has abandoned his children. Here, the "family-study" performed by Ed Vien, a psychologist, has failed to establish any fact which an objectively reasonable trier of fact could conclude would allow the grandparents custody or Miller visitation over father's reasoned objections. For these reasons alone, the father is entitled to custody and the court should deny the grandparents Motion and dismiss Mr. Miller's Motion outright.

Transcript Vol 6 (May 18, 2000 trial court hearing) By father's trial counsel, Mr. Kehoe

"...Dr. Vien relies, in large part, on hearsay from people and doesn't do anything independent to further corroborate or prove or disprove anything, and even in the end, the best he can do is to try to tell you that he thinks something might happening the future. You know, it may result; there may be a problem, but he is not telling you my client is unfit. Until he tells you that, Judge, its's our contention that we don't even get to the best interests threshold. We don't even get to the constitutional issues. My client is the dad. He is not on a level footing with

these grandparents or Mr. Miller. He is the guy who had the right to say where his kids go absent a revocation of those rights.

THE COURT: Mr. Kehoe, is that not what the Sleeper court said?

MR. KEHOE: That is what I am arguing. Sleeper, at 511, is clear that unless he does something like that, he has got that supervening right as a dad, and there are a number of states out there that don't even have a grandparents' visitation statute. Ten to one it has been declared unconstitutional. There are a multitude of states that say, "Wait a minute. Since when do we change the nature of relationships where parents" -- they advocate their constitutional right to determine the social contacts of their children with third parties."

FATHER'S BRIEF ON THE MERITS TO THE OREGON SUPREME COURT

(Excerpt from pp. 13,14)

* * * * *

Current ORS 109.119 (4) (b) allows rebuttal of the *Troxel* presumption in custodial disputes either by a showing that the parent is unwilling or unable to care adequately for the child or that the child will be harmed if custody is awarded to the parent.

* * * * *

(Excerpt from p. 34)

Standing alone, the rebuttal factors at current ORS 109.0119 (4) (b) (B) (D) and (E)... become important where a relevant relationship is demonstrated between these rebuttal

factors and either the inability of the parent to adequately care for the child or where the child has been abandoned with a third party who has established a child-parent relationship and the child would be harmed if custody were suddenly and unexpectedly transferred to the legal parent.

* * * * *

(Excerpt from p. 58)

Because Grandparents have failed to establish any *nexus* between Father's purported bad faith or his alleged "25 lies" and any resultant in harm to the children, and because the record demonstrates that Father is capable of adequately caring for and loving his children and that Father presents absolutely no present or remote threat of harm to his children, Grandparents' case must fail.

* * * * *

FATHER'S PETITION FOR RECONSIDERATION BEFORE THE OREGON SUPREME COURT

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* * * * *

(Excerpt from pp. 13,14)

***Troxel* Instructs How the Rebuttal Factors and Evidence Supporting Those Factors are to be Weighed.**

First, this 50-state survey indicates that either a showing of unfitness OR exceptional or extraordinary circumstances detrimental to the child's interest will rebut the *Troxel* presumption. See Father's Brief of the Merits at p.41.

* * * * *

(Excerpt from p.15)

This, of course, is not to suggest that a finding of parental fitness necessarily concludes the matter. A showing of "detrimental circumstances" which includes some quantum of harm less than "present risk of serious harm", together with an adequate showing of other rebuttal factors at current ORS 109.119 (4) (b) (B-E), may suffice to overcome the presumption that the parent acts in his children's best interests. However, *Troxel* and other US Supreme Court decisions instruct us that such a "safety valve" rebuttal showing will not normally be made. *Troxel, supra*, 530 US at 68. Only in the most "extraordinary or exceptional circumstances" — circumstances not present in this case — may such a rebuttal showing be made consistent with substantive Due Process.

* * * * *

(Excerpt from p. 17)

The Risk of Erroneous Deprivation by Use of the Standard of "Serious Present Risk of Harm" and a Simple Totality of Evidence Test

* * * * *

(Excerpt from p.18)

In certain circumstances, not present in this case, the remaining, non-exclusive rebuttal factors at current ORS 109.119 (4) (b) (B)-(E), plus other factors not enumerated, might preponderate to rebut the *Troxel* presumption. This Court's opinion develops a simple "consider[ation] of all the evidence" test — "whether the evidence as a whole is sufficient to overcome the presumption, to justify awarding custody to grandparents." Slip op at 32,46 (emphasis added)

With respect, the decision's "totality of evidence" test does not pass the federal Due Process muster. To do so, the "dominant opinion" in the Nation, which is given a strong Due Process presumption of validity, must be heeded. That "dominant opinion" tells us that if a parent is found to be fit, in order to rebut the parental presumption, the evidence of other non-exclusive rebuttal factors must preponderate to show a totality of "extraordinary or exceptional circumstances." Such a showing will minimize the risk of erroneous deprivation to both parent and child, especially where you have a fit, custodial parent.

Supreme Court, U.S.
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(2)

No. 04-449

IN THE
SUPREME COURT OF THE UNITED STATES

Michael David Lamont, Jr.,

Petitioner,

v.

Christine and Patrick O'Donnell,

Respondents.

On Petition for Writ of Certiorari to the
Supreme Court of the State of Oregon

RESPONDENTS' BRIEF IN OPPOSITION

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December 1, 2004

QUESTION PRESENTED

Whether Or. Rev. Stat. 109.119 *et seq.*, amended by the 2001 Oregon legislature to comply with the dictates of *Troxel v. Granville*, 530 US 57 (2000), was constitutionally *applied* by the Oregon Supreme Court when it found as follows:

> Considering all the evidence, we conclude, on *de novo* review, that grandparents have rebutted, by a preponderance of the evidence, the presumption that father acts in the best interests of the children.

Pet. Cert., App. A-38.

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INTRODUCTION

Respondents are the maternal grandparents and, under state law, the "psychological parents," who have been awarded custody of their two grandchildren by the Oregon Supreme Court.

STATEMENT OF THE CASE

Because this case involves a third-party custody dispute, it is heavily fact dependent. The Oregon Supreme Court reviewed this record *de novo* and entered lengthy findings of fact and further supplemented those facts throughout its opinion. *See,* Pet. Cert., App A-3-5. This Court is urged to rely upon the facts as found by the Oregon Supreme Court because father's fact statement is not always complete. For example, father writes:

> The [trial] court ordered the children returned to father, who agreed he would keep them in the Salem, Oregon area. App D-3,4. Father moved with the children to Montana for a brief six week period (Findings 31 and 32; App B-7,8), but returned the children to Oregon when ordered by the trial court to do so. App D-4.

Pet. Cert., 2. In comparison, the Oregon Supreme Court found these facts as follows:

> Father assured the [trial] court he would keep the children in the Salem area.

> However, despite that promise, father moved to Montana with the children and his girlfriend, Laura Oliver, in September 1999, without notice to the court or the grandparents. Father refused to disclose his address in Montana to grandparents and avoided grandparents' efforts to serve him legal papers. The court found father in contempt and ordered him to return the children to Oregon, which he did.

Pet. Cert., App A-5. The trial court described father's disappearance to Montana with the children as follows:

> it would be only a slight exaggeration to say that [father] folded his tent in the middle of the night and left without a trace.

Letter Opinion, 4 (July 25, 2000).

REASONS TO DENY THE WRIT

1. The States serve as the primary sources of law for the nation's family law courts. Although this Court, in *Troxel v. Granville*, 530 US 57 (2000), recognized a rebuttable presumption that a fit parent will act in the best interests of his or her children, this Court did not establish a due process standard, and, in fact, declined to do so, reserving that work for the States. *Id.* at 73.

2. In response to this Court's opinion in *Troxel v. Granville*, the Oregon Legislature established Oregon's due process

standard. Acting within a permissible range, the Oregon Legislature passed the 2001 amendments to Or. Rev. Stat. 109.119 *et seq.*, establishing a new statutory presumption, burden of proof, and factors analysis intended by the state to comport with *Troxel v. Granville* when resolving third-party custody disputes.

3. The constitutionality of Oregon's new statutory scheme is not in dispute, as "[t]he parties agree that [the new statute] is facially constitutional." *See,* Pet. Cert., App A-21.

4. Oregon's new statutory presumption, burden of proof, and factors analysis were applied consistent with *Troxel v. Granville*. The 2001 amendments (set out in the text of the Oregon Supreme Court opinion, *see*, Pet. Cert., App. A-19-22) provide the constitutional protection to which father is entitled in the form of a legal presumption in his favor together with a new statutory burden of proof and factors analysis to establish the due process standard, thereby giving effect to the legal presumption that a fit parent acts in the best interests of the child and "special weight" to the parenting decisions of a fit parent. *Id.*

5. Oregon's new statute is narrowly drawn. It is only because grandparents are also psychological parents that they may seek custody by a preponderance of the evidence. Otherwise, the statute limits grandparents to "visitation or contact rights" by clear and convincing evidence. Or. Rev. Stat. 109.119(3)(b).

6. The trial court found that grandparents are psychological parents, a finding that is not disputed:

> The grandparents clearly meet the statutory definition of psychological

> parents. The grandparents have established a child-parent relationship with the children under ORS 109.119(5)(a).

Letter Opinion, 8.[1] [2]

---

[1] Or. Rev. Stat. 109.119(5)(a) has been renumbered to Or. Rev. Stat. 109.119(8)(a), but the definition of a "child-parent relationship" remains the same except that the duration of the relationship required for foster parents must exceed 12 months under the current statute instead of 18 months under the former statute.

[2] Should any disputed facts be important to this Court's assessment, the trial court also entered credibility findings against father:

> Indeed, my overriding impression of Father is that honesty has no value for him. He has said whatever he believed would help him at the time, without regard to its truthfulness. Father's word alone is insufficient to prove anything.

Letter Opinion, 3 (July 25, 2000). The trial court further commented that:

> I counted over 25 lies by Father. These range from statements to Judge Letourneau regarding remaining in the Salem area to statements concerning Ms. Oliver's anger and drug issues. They include denials of statements Dr. Vien attributed to him and denials of the nature and number of restraining order violations.

Id. at 3, fn 2.

7. Grandparents are psychological parents because a "child-parent relationship" exists, meaning that they have fulfilled the role of a legal parent:

> (a) "Child-parent relationship" means a relationship that exists or did exist, in whole or in part, within the six months preceding the filing of an action under this section, and in which relationship a person having physical custody of a child or residing in the same household as the child supplied, or otherwise *made available to the child, food, clothing, shelter and incidental necessaries and provided the child with necessary care, education and discipline, and which relationship continued on a day-to-day basis, through interaction, companionship, interplay and mutuality, that fulfilled the child's psychological needs for a parent as well as the child's physical needs*. However, a relationship between a child and a person who is the nonrelated foster parent of the child is not a child-parent relationship under this section unless the relationship continued over a period exceeding 12 months.

Or. Rev. Stat. 109.119(8)(a) (emphasis added). The trial court's findings that the grandparents are psychological parents is compelling:

> On a daily basis, the grandparents provided the children with food, clothing, shelter and incidental necessaries as well as care, education, and discipline. This was accomplished through interaction, companionship, interplay and mutuality that fulfilled the children's physical and psychological need for a parent. At the children's most vulnerable hour, the grandparents took them in, fed them, loved them, and guided them. Because of the years of close contact between the grandparents and the children, it was natural for the grandparents to do this and for the children to look to them for this parenting. It is important to remember that this is not a case where grandparents hopped on a plane in order to step into the breach brought on by the unexpected death of their Daughter. These grandparents were geographically and emotionally close to the children throughout their lives.

Letter Opinion, 9.

8. The Oregon Supreme Court found that:

> awarding custody to father would pose a serious present risk of psychological or emotional harm to the children.

See, Pet. Cert., App A-33; *see, also, id. at* App A-35 ("Having reviewed the entire record, we find that circumstances detrimental to the children would exist if custody is granted to father"). The Oregon Supreme Court further found that grandparents rebutted the legal presumption in father's favor:

> Considering all the evidence, we conclude, on *de novo* review, that *grandparents have rebutted*, by a preponderance of the evidence, *the presumption* that father acts in the best interests of the children.

Pet. Cert., App. A-38 (emphasis added).[3]

9. Finally, the Oregon Supreme Court correctly understood and applied *Troxel v. Granville*:

---

[3] The Oregon Supreme Court's findings and ruling were not much different than the trial court's findings and ruling:

> In short, all the dangers that father presented to the children at mother's death are still there. These circumstances present sufficient threat of harm to the children to defeat whatever supervening right Father may have as a biological parent. Although Father is not so unfit as to justify termination of his parental rights, he is sufficiently dangerous to their welfare to justify limitation of his parental rights under Oregon's statute. This application of the statute is consistent with Father's state and federal constitutional rights.

Letter Opinion, 8.

As our earlier discussion of *Troxel* demonstrates, that case does not sweep as broadly as father asserts. *Troxel* specifically declined to address the so-called "harm" standard, and it also failed to articulate an "inadequate care" requirement. Rather, the due process right that the Supreme Court affirmed in *Troxel* is important, but limited: a court may not override a parent's decision about the care or custody of a child simply because the court determines that the decision is not in the child's best interest, as the trial court did in *Troxel* regarding a grandparent's interest in visitation. *Instead, the court must presume that a fit parent's decision is in the best interest of the child, and the court may reach a decision contrary to the wishes of the parent only if there is evidence sufficient to overcome that presumption. Troxel* goes no further.

Troxel does require the state to give "some special weight" to the interest of a parent in decisions regarding a child. ORS 109.119, as we have interpreted and applied it here, responds to that mandate and appropriately protects father's due process rights. *In our factual findings and legal conclusions, we have followed the statute and presumed that father acts in*

> *the best interests of the children*. We have considered a petition by grandparents who have the status, under the statute, of psychological parents. We have examined factors reasonably identified by the legislature as relevant to making a custody decision, *and we have concluded, by a preponderance of the evidence, that the evidence in support of those factors overcomes the presumption that father will act in the best interests of the children*. Father received the deference to his due process rights that *Troxel* requires. For the foregoing reasons, we award custody of the children to grandparents, with parenting time, as determined by the trial court, to father.

Pet. Cert., App A-41-42 (emphasis added).

CONCLUSION

FOR THE FOREGOING REASONS, grandparents urge that the petition for writ of certiorari be denied.

Respectfully submitted,

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December 1, 2004